CHAPTER IV

ENFORCEMENT OF ARBITRAL AWARDS IN INTERNATIONAL TRADE TRANSACTIONS

1. Introduction

The purpose of arbitration, unlike conciliation and some other methods of alternative dispute resolution, is to arrive at a binding decision on the dispute between the parties. It is an implied term of every arbitration agreement that the parties will carry out the decision of the arbitral tribunal - the award. Although express provision to this effect is unnecessary, there are often found both in arbitration clauses and submission agreements as well as in international, institutional, and ad-hoc rules of arbitration, certain words to emphasize the binding nature of the award. Arbitration is not like conciliation or mediation, where the result may be acceptable to both the parties. The successful party expects the award to be performed without delay.

In vast majority of cases the award is 'voluntarily' performed by the unsuccessful party after it has received notice of it. There is usually an element of commercial or other pressure behind such 'voluntary' performance of award. The most powerful pressures involve the business interests and financial
losses. Arbitral award by some trade association of which the loser is a member; guaranteed execution of the award by a security; property belonging to the losing party in the hands of the winner; respect for opinion of the arbitrator; fear of being criticised by one's own business community; adverse effect on its trade relation with others resulting into financial losses and an apprehension that non-performance may be interpreted as evidence that one's business is in a critical financial situation are also some of other reasons for prompt and willing enforcement of arbitral awards.

Sometimes, failure of commercial and other pressures for so-called 'voluntary' performance of an award and persistent refusal by a losing party to perform it compel a successful party to take recourse to some coercive measures to enforce an award against a defaulting party. An arbitral tribunal, unlike a court of law, has neither coercive powers to enforce its award nor role to play in its enforcement. Once an award is rendered by it, the tribunal has nothing more to do with the dispute. Neither an arbitral tribunal nor any arbitral institution under whose auspices it may be operating, is directly concerned with recognition and enforcement of its award. Similarly, an arbitral award, unlike an order or judgment of a court, does not immediately empower a successful party to levy its
execution against assets of an unsuccessful party or to apply to have it committed for contempt. A winning party, in such a situation, therefore, is not left to any alternative except to invoke jurisdiction of a competent court, which is armed with the authority of a State and a few coercive measures to compel a defaulting party to perform an award and to seek appropriate remedies. A party seeking judicial help in enforcement of an award against a reluctant party has to move competent court in the place of recognition and/or enforcement of an award. It needs emphasis that a domestic court, functioning under its national lawn providing for a well-elaborated scheme for enforcement of domestic awards and recognising an unquestioned jurisdiction of its courts to enforce domestic arbitral awards, does not have an inherent jurisdiction in the matters and issues resolved in other country or involving a "foreign element". The recognition and enforcement of arbitral awards rendered in international commercial arbitration, therefore, stand on a different plane.\(^1\) Obviously, attitude of municipal law and its domestic courts to awards involving a "foreign element" determines the degree of the "coercive measures" compelling an obstructionist party to "perform" a foreign award and nature of appropriate remedy to the requesting party. Accordingly, the extent and limits of these coercive measures available to the courts to
compel a reluctant party and the extent to which the courts are prepared to use them are governed by the national law.

However, legal systems of almost all countries, which do provide ample legal remedies for the enforcement of domestic awards, reveal wide disparities and remarkable differences in law and practice regarding recognition and enforcement of foreign arbitral awards. The difference is particularly pertinent in the area of law applicable, substantive as well as procedural; conditions to be satisfied with; grounds for attack and refusal of requested awards; nature of remedies available; method of recognition and enforcement to be adopted and other allied matters pertaining to recognition and enforcement of foreign arbitral awards. The differences are the obvious consequences of the wide variety of theoretical and political approaches taken by the framers of the said legislations and general attitude of the law of the State towards arbitration as such. This variance in national laws, obviously, led to ununiform and unpredictable results and tempted parties for "forum shopping" in enforcement of foreign awards.

The sole reliance on the diversified national arbitration laws of the place of arbitration (forum) and the place where enforcement of arbitral award is sought; unfamiliarity of such laws; availability and adequacy of
assets of the reluctant party in a country or countries to meet the award; attitude of the prospective court: international or parochial, to the recognition and enforcement of the international arbitral award etc. proved to be a nightmare of complexities in enforcement of foreign awards. The prevailing wide diversity, disparity and complexity in substantive and procedural laws of different national systems governing coercive powers of a court vis-a-vis international arbitral awards coupled with the unpredictable attitude of the local courts to the requests of the parties for recognition and enforcement of foreign arbitral awards have obviously created hindrances in the administration of arbitral justice. It has also proved detrimental to the development of international commercial arbitration in particular and intentional trade in general.

Need for a certain, uniform and simple system of recognition and enforcement of foreign arbitral awards, a vital aspect of international commercial arbitration, ensuring 'justice' to the winning parties, was felt necessary for smooth flow and growth of international commercial arbitration as an effective machinery of settlement of international commercial disputes. This obviously involves internationalisation of rules of recognition and enforcement of foreign awards independent of national laws. Accordingly, there have been concrete and sincere efforts at the international,
regional and national levels for unification of rules of recognition and enforcement of transnational commercial awards.

A survey of such attempts and their contribution, for the sake of convenience, can be discussed under the following heads:
(A) Activities undertaken within the framework of the League of Nations.
(B) Activities undertaken within the framework of the United Nations.
(C) Activities undertaken at the regional level for unification and harmonization.

II. Enforcement of Arbitral Awards under Multilateral Conventions and Regional Arrangements: Efforts for Unification

2.01 Activities undertaken within the framework of the League of Nations

After the First World War international trade expanded as a necessary evil. The zeal of parties to resolve differences arising from such international commercial transactions out of courts motivated them to have recourse to arbitration. They, as stated above, were confronted with uncertain, ununiform and unpredictable rules and practice of international commercial arbitration due to dominance of diverse
national laws. Out of these validity of arbitration agreement, arbitral procedure and recognition and enforcement of foreign arbitral awards were prominent. Therefore, it was felt necessary to evolve some multilateral methods to ameliorate the adverse conditions and to facilitate easy recognition and enforcement of resulting awards.

However, initially the League of Nations, which was established in 1919 by the treaty of Versailles to ameliorate relations between the States inter se, was not concerned with the relations, even of an international nature, between private enterprises. The International Chamber of Commerce (ICC), the then newly established institution in Paris, took initiative for an international convention to remove unenforceability of arbitral clauses, one of the major obstacles at that time. Under its pressure the League of Nations agreed to intervene in two domains of special interest of international business, namely, law of arbitration and negotiable instruments. The practical realization of such multilateral approach culminated in two principal international instruments under the auspices of the League of Nations in the field of arbitral agreements and enforcement of arbitral awards, namely, the Protocol on Arbitration Clauses of 1923 (hereinafter referred to as the Geneva Protocol) and the Convention on the Execution of Foreign Arbitral Awards of 1927.
(hereinafter referred to as the Geneva Convention). These two instruments, which are now largely superseded by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations on June 10, 1958\(^5\) (hereinafter referred to as the New York Convention), not only marked the first major step in recognition of the worldwide importance of international commercial arbitration in the development of international trade but also played a vital role in the field of the recognition and enforcement of international commercial awards.

The Geneva Protocol sought to make arbitration agreements, in particular arbitration clauses submitting present or future differences to arbitration, valid and enforceable in all the Contracting States and to ensure enforcement of the Protocol awards made pursuant to such agreements.

However, the duty of irrevocability of arbitration agreement imposed on the Contracting States was delimited by restricting recognition of validity of such arbitration agreements only when the parties were subjected to jurisdiction of different Conracting States. It, with a view to fostering international trade, also allowed the Contracting States to limit their obligation to contracts considered as 'commercial' under their 'national laws' or 'any other matter capable of settlement by arbitration'.\(^6\) The Protocol, thus, did
not proclaim rules of general application in international trade laws, but remained faithful to the 'classical' conception of international law. So far as the enforcement of awards was concerned each Contracting State of the Protocol had to ensure execution of the Protocol award made in its own territory in accordance with the national law of the arbitral award.7 This provision due to its inherent limited range, also failed to provide an elaborate scheme for the recognition and enforcement of arbitral awards. Further, it did not provide for either any undertaking ensuring recognition and enforcement or any rule affirming enforcement of arbitral awards made in another States, even in a Contracting State. It, therefore, hardly could make any visible bearing on the recognition and enforcement of arbitral awards.

The Protocol scheme, therefore, was soon recognised as 'insufficient'. It had not only given rise to genuine complaints about easy enforcement of awards abroad in spite of a valid arbitration, but also caused appreciation among the Contracting States that absence of any international agreement for easy enforcement of the Protocol awards would affect utility of the Protocol.

The question of international recognition and enforcement of foreign arbitral awards, initiated by
the Geneva Protocol, however, got momentum when the Council of the League of Nations established an Expert Committee to examine the matter. The Expert Committee, expressing its reservations about utility of bilateral arrangements, asserted for a multilateral scheme as an urgent practical need in the field of enforcement of awards. However, it opined that the proposed multilateral scheme be limited only to the awards arising from the Protocol agreements to avoid 'too great complexity'. It accordingly submitted a draft Protocol on awards, as it was then called, to the Economic Committee. It ultimately culminated in the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, supplementing the Geneva Protocol and ensuring 'enforcement of arbitral award made in pursuance of an arbitration agreement falling under the Geneva Protocol'.

The Geneva Convention, in its quest to provide for smooth recognition and enforcement of the convention awards in the contracting states, imposed an obligation on each Contracting State to recognise a convention award rendered in another Contracting State as 'binding' and to enforce it in accordance with the procedural rule of the forum. It also laid down the conditions necessary for its enforcement; specified the circumstances justifying denial of its enforcement and listed minimum documents required to be produced by
the party claiming enforcement of an award to sustain its claim.\textsuperscript{13}

However, the growing intensity of modern international trade and resort to arbitration as a settlement machinery of international commercial disputes exposed a few in-built weaknesses of the Geneva Convention\textsuperscript{14} and consequential practical difficulties in enforcing a Convention award. Principal among them were: (1) The Convention was applicable only between the States who were parties to the Geneva Protocol. The limited applicability unduly restricted enforcement of foreign awards and delimited its scope. One of the emerged teething problems in its operation was the requirement of the parties to "subject to the jurisdiction of different States". An immediate practical implication of the clause was that the Convention excluded submission agreements between nationals of the same Contracting State for arbitration in some other Contracting State when it could be extended to the similar submission agreements between parties of different Contracting States. The expression "subject to the jurisdiction of different States", determining the ambit of the Convention, was also not free from ambiguity. It was not clear whether it meant subject to sovereignty of a State in the sense of nationality, or subject to jurisdiction of the courts of a State by reason of residence, domicile or other
criteria. It excluded recognition and enforcement of arbitral awards rendered in a State not party to the Geneva Protocol (in turn to the Geneva Convention) even on the ground of reciprocity. Such exclusion was unjustified when it was a normal practice for a State to recognise and enforce a foreign judgment on the ground of reciprocity.

(2) The Convention placed upon the party seeking recognition and enforcement of an arbitral award heavy burden of proving the conditions necessary for such enforcement. The party seeking enforcement had to produce documentary evidence to show that the award was 'final' in the country in which it was made; that the award belonged to the general class of enforceable foreign awards under the Convention; that it was made under a submission valid under the Geneva Protocol; that the subject-matter of the requested award was capable of settlement by arbitration in accordance with the lex fori; that it was rendered by an arbitral tribunal constituted in accordance with the agreement of the parties and in conformity of the law of the arbitral procedure; that the requested recognition or enforcement was not contrary to the 'public policy' or 'the principles of the law of the country' in which it was sought and that it was not annulled in the country in which it was made. (3). In practice the finality of the award could be proved only by producing an exequatur, i.e. leave for enforcement or like, issued in the
country in which the award was made and a leave for enforcement in the country of enforcement. Thus, in practice the requirement of finality resulted in the so-called system of double exequatur requiring an exequatur from the court of the place in which the award was made and an exequatur from the forum court. This system of double exequatur not only led to time consuming hurdle in the enforcement of awards but also it allowed the respondent to adopt delaying tactics and to forestall the award becoming 'final' by instituting setting aside proceedings in the country in which the award was made.

(4) Further, due to diversity and complexity in national laws and rules of the conflict of laws it was not very easy for a party seeking enforcement to prove, among other essentials, 'validity' of an arbitration agreement, 'finality' of an award and propriety of the arbitral tribunal and its conformity with the 'public policy' or the 'principles of the law of the lex fori'. This condition in fact provided an opportunity to a reluctant party to attack an award not merely on the ground of violation of public policy but also on the ground that it offended the 'legal principles of the forum State. In fact, these two phrases 'public policy' and 'principles of law' were vague and subjected to varied interpretations. Similarly, the condition of validity of an arbitration agreement in accordance with the 'law applicable thereto' had not only surrendered validity of an arbitration agreement to the conflict of
laws rules of the forum of enforcement but permitted the court to examine the requested award to grant the required leave for enforcement. (6) Further, provisions of the Geneva Protocol and the Convention stipulating the requirement of the arbitral procedure to be governed by the will of the parties and lex loci arbitri led to controversy. These instruments, though provided for the above arrangement, did not provide for any guidelines to ascertain whether they contemplated both the conditions cumulatively or alternatively. The conundrum led to confusion about the arbitral procedure to be required for the enforcement of ‘foreign arbitral awards’ under the scheme constituted by the Geneva Protocol and the Convention.

(6) The reservation available to the signatories of the Convention to delimit their obligation to the differences arising out of a ‘conflict relating to commercial matters determined in accordance to its municipal law’, obviously, curtailed ambit of the Convention.

These in-built weaknesses of the Convention leading to certain inherent shortcomings, uncertainties and undesirable variances in its application minimised its efficacy as ‘an international instrument’ of recognition and enforcement of foreign arbitral awards. One should not overlook the fact that no Western Hemisphere nation participated in or ratified the Geneva
Convention and of those nations that did some of the conditions of ratification were sufficiently complicated to raise grave doubt as to whether or not an arbitration award would be enforced by the courts.\textsuperscript{16} It is also weighed the scales heavily against the party seeking enforcement, on the one hand, and enabled the obstructionist to challenge and attack the award on a number of grounds and to adopt various obstructive tactics, on the other.

Nonetheless, the Convention should not be ignored and undermined simply because of its inherent weaknesses, delimited application and some difficulties in its interpretation.\textsuperscript{17} It did involve a radical change in the law and practice of enforcement of foreign arbitral awards. Some nations (as Switzerland) automatically changed their laws when they ratified the Convention while others (like British India)\textsuperscript{18} enacted implementing legislation. A few States (like France, Poland and Sweden) incorporated principles of one or both of the instruments - the Geneva Protocol and the Geneva Convention - into their general law.\textsuperscript{19} It, thus, represented a significant advance and important improvements in the laws pertaining to arbitration and enforcement of arbitral awards. It would, therefore, not be an exaggeration to say that the Convention, inspite of the above mentioned inherent weaknesses, represents a first major step on the road towards
international recognition and enforcement of international commercial arbitral awards. Indeed, the Geneva instruments by which the Contracting States agreed, as a matter of international cooperation, to recognise arbitration agreements made by parties subject to the jurisdiction of different states and arbitral awards resulting from such agreements as binding and to ensure their enforcement, represent the first stage of what has become a long and continuing process for regulation and harmonization of arbitration as a means of dispute resolution in the field of international trade.

2.02 Activities undertaken under the auspices of the United Nations

The above mentioned inherent shortcomings and practical difficulties of the Geneva scheme could not raise the Geneva instruments to the expectations of the international business community which ultimately brought the issue once again to the fore. With it came a growing demand for the replacement or rectification of such inadequate and unsatisfactory Geneva arrangements to ensure effective and easy recognition and enforcement of foreign arbitral awards for smooth flow of international trade.

At the Lisbon Congress of the International Chamber of Commerce (ICC) the business community
criticised the Geneva Convention as "no longer, ... meeting modern economic requirements," and appointed a committee on International Commercial Arbitration. The committee subsequently submitted a preliminary draft on "Enforcement of International Arbitral Awards" to governments, through the UN, for their consideration. It, though aware of the fact that a commercial agreement always links up with a given national system of law, mooted an idea of international award, an award completely independent of, and divorced from, national laws and solely based on the "will of the parties" and international convention. Its underlying argument was that an award settling a dispute arising out of an agreement produces same effects in different countries and it, therefore, expects same treatment in all the countries. The ICC draft convention sought to attain this purpose mainly by extending its application to commercial disputes "involving legal relationships arising in the territories of different States" and by leaving composition of arbitral authority and the arbitral procedure to the parties. And only in the absence of such agreement they have to conform with the law of the country where arbitration took place.

The United Nations Economic and Social Council (ESOSOC) took note of the ICC draft convention and established an Ad-hoc committee of government experts from eight countries to study the ICC preliminary
draft convention and to report its conclusions to the Council and to draw up, should it see fit, a draft Convention. The Ad-hoc committee, using the ICC Preliminary draft as a working paper for its deliberations, prepared a draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although unwilling to support the concept of an international arbitral award, the Committee regarded a strict requirement of reciprocity as undesirable and called rather 'vague and ambiguous' the provisions of the Geneva treaties limiting their application to awards made between persons subject to the jurisdiction of different Contracting States. The Committee accordingly extended its draft Convention to awards arising out of any difference between any person, rendered anywhere outside the State where enforcement is sought, unless a State expressly limits the scope of the Convention to awards rendered in the territory of other Contracting States or awards relating to commercial disputes.

The UN Secretary-General, at the request of the ECOSOC, transmitted the draft Convention to governments and interested organisations for their comments. As a result of generally favourable response, the Council decided to convene a diplomatic conference to conclude a convention on the recognition and enforcement of foreign arbitral awards on the basis of the draft prepared by the Ad-hoc committee.
The United Nations Conference on International Commercial Arbitration was held at New York from May 20 to June 10, 1958 to consider "the effective measures for the recognition and enforcement of foreign arbitral awards" and "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes". On the basis of the deliberations the Conference prepared and opened for signature the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (hereinafter referred to as the New York Convention). 25

It is important to emphasize that the final text of the Convention adopted at the New York Convention was in many ways an intermediate solution between the 1927 Geneva Convention and the ICC preliminary draft. For example, the 1927 Geneva Convention required that an arbitral award should be national, that there should be both personal and territorial reciprocity, and that award should have become "final" in the country in which it was made. While the ICC preliminary draft, in contrast, was based on a diametrically opposed idea of the international award divorced from national criterion. The New York Convention, although it retained the title of the Geneva Convention to the effect that it refers only to foreign arbitral awards and not to international awards as advocated in the preliminary draft adopted a text which was nevertheless
broader than the text of the draft prepared by the ECOSOC.

The prime motive of the New York Convention was to revise 'the unsatisfactory' and 'too cumbersome' practical implications of the 1927 Geneva Convention and to provide for a much more simpler and effective method of obtaining recognition and enforcement of foreign arbitral awards. It, in its zeal to ensure recognition and enforcement of foreign awards, creates binding obligations on the Contracting States to recognise arbitration agreements and to refuse an access to their courts to those who refuse to submit relevant disputes to arbitration, and to recognise awards and, if requested so to do, to make available domestic enforcement facilities without discriminating against those awards. It facilitates easy recognition and enforcement of award by enumerating the grounds for its enforcement and refusal and by shifting the burden of proof on the reluctant party.

The New York Convention, when compared with the Geneva Convention, its predecessor, can certainly be considered as an improvement. Its advantages over the Geneva Convention are aptly outlined by Schurmann of the Netherlands, President of the 1958 New York Conference, at the close of the meeting. He observed:
"--- [1] It was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choices of arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relief upon the right to order the party opposing the enforcement to give suitable security." 28

It, unlike the 1927 Convention which was limited only to awards made in the territory of, and between persons subject to the jurisdiction of, one of the High Contracting States, is made applicable to awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. 29 It no longer requires that the parties be subject to jurisdiction of different Contracting States. 30 It is also made operative in respect of awards 'arising out of differences between persons whether physical or legal' and awards which are not considered 'domestic' in the State where their recognition and enforcement is sought. 31 Thus, it, unlike its predecessor, does not provide for 'nationality requirement' for enforcement of awards and thereby enlarges its ambit.
The New York Convention has also greatly improved the law relating to the refusal to enforcement of a foreign award. A mention may be made that it eliminates the cumbersome requirements of the requirement of the \textit{finality} of an award as a \textit{condition precedent} for its enforcement under the Geneva Convention. Under the 1927 Convention an award could be enforced only if it was \textquote{final} in the country in which it was rendered. An award used not to be considered \textquote{final} if it was open to \textit{opposition}, \textit{appel} or \textit{pourvoire} \textit{cassation} or proceedings contesting its validity were pending in the country of its origin. The New York Convention mandates every Contracting State to recognise an arbitral award \textquote{binding} and \textquote{enforceable} in its country when it is relied upon.\textsuperscript{32} And it is for the party resisting enforcement to furnish proof that the award has not yet become \textquote{binding} on the parties or has been set aside or suspended by a competent authority in which or under the law of which the award was made.\textsuperscript{33} However, with a view to affording a defendant appropriate safeguards, a number of basic prerequisites, in the absence of which enforcement could be refused, are expressly stated in the New York Convention. A petition to enforce may fail if: the arbitration agreement was entered into under some incapacity or is otherwise invalid; the debtor was not given proper notice of the appointment of arbitrators or of the arbitral procedure or was
otherwise unable to present his case; the award deals with differences not submitted to the tribunal or beyond the scope of the submission to arbitrator; the composition or procedure of the arbitral tribunal was not in accordance with the parties stipulations or, failing such stipulations, the law of the place of the arbitration; the award has not yet become binding or has been set aside or suspended in the country of origin. It is important to note that even the defendant proves any of these defences to enforce the award is still within the discretion of the court and not mandatory as it generally was under the Geneva Convention. However, in order to ensure, as far as possible, that these factors would not turn into familiar devices to delay or frustrate enforcement proceedings, the burden of proving as to their existence has been shifted to the defendant.

The New York Convention seeks to avoid the double exequatur phenomenon, which was prevalent in the Geneva Convention scheme. The party seeking enforcement of an arbitral award, now, has to submit the award, an arbitration agreement or certified copies of them to seek an enforcement. No longer has he to show that the award was `final' in the country where it was made or to prove that the condition for the applicability of the convention are complied with, that the award was made in conformity with the convention by the tribunal.
constituted in accordance with the submission agreement and with conformity of the law governing the procedure, as had been necessary in consequence of article IV of the Geneva Convention.

It also recognises contractual autonomy of the parties to choose arbitrators, venue of arbitration, applicable proper law and procedural law. It may be recalled that under the 1927 Geneva Convention it was required that the arbitration proceedings had to be in accordance with both the arbitration agreement and the law governing arbitration proceedings.

It also simplifies the conditions required for enforcement of foreign awards and makes it more difficult for a reluctant party to block its recognition and enforcement on flimsy grounds. Under the Geneva Convention, it was incumbent on the party seeking recognition and/or enforcement of an award to prove that the conditions required for recognition had been fulfilled and that enforcement could be authorised. The New York Convention, on the other hand, adopts a system based on the idea that an award constitutes, in the hands of the person obtaining it, an instrument to which credit must be given. Consequently, the fact of presenting that instrument accompanied by the text of the arbitral agreement, original or its duly certified copy, must be considered prima facie mandatory and that the person seeking its recognition and enforcement is
authorised to obtain it. And from that moment the burden of rebuttal passes to the respondent, who, in order to oppose the recognition and enforcement, must prove the existence of one or more of the five grounds exclusively stipulated in the convention for denial of recognition or enforcement of a foreign award.

The 1958 Convention by leaving composition of arbitral tribunal and arbitral procedure to the parties, puts an end to the controversy that arose out of the corresponding provisions of the 1923 Geneva Protocol and the 1927 Convention. These two instruments stipulated the arbitration procedure to be governed by the will of the parties and by the lex loci arbitri without making it possible to ascertain whether two cumulative conditions or (only) a single form of references were involved.

The 1958 Convention, thus not only gives binding effect to arbitral awards but also limits the grounds on which a party can object its enforcement and shifts the burden of proof on the obstructionist party. It should, however, be noted that these improvements have been effected without sacrificing any of the essential safeguards contained in the 1927 Convention against using the legal machinery of one country to enforce unjust, fraudulent or oppressive awards made in another. It, like the 1927 Convention, maintains the principle of
'fundamental importance' that arbitration is a legal process subject to control by the appropriate legal authorities of the country in which it is carried out.

2.03 Activities undertaken at Regional Level

With a view to eliminate, as far as possible, controversial problems arising due to dependence on, and application of, different national laws in the field of international commercial arbitration a few conventions, from time to time, were evolved at regional level.36 A few of these conventions have a significant bearing on the recognition and enforcement of foreign arbitral awards. The principal conventions are:


(3) Inter-American Convention on International Commercial Arbitration, 1975 (hereinafter referred to as the Panama Convention).

2.03.1 The European Convention of 1961

The European Convention,37 which was made under the aegis of the Trade Development Committee of the UN Economic Commission for Europe, is applicable to
international arbitrations settling trade disputes between parties from different States, whether European or not. 38

It makes an important stipulation that the setting aside of an arbitral award for the reasons specified under the Convention in a Contracting State only constitutes a ground for the refusal of recognition or enforcement in another Contracting State. Article IX (1) of the Convention endeavours to restrict to a minimum the number of grounds on which an award may be set aside with international effect. The reasons stipulated for setting aside of an award include incapacity of the parties or invalidity of the arbitration agreement; or lack of proper notice of the appointment of the arbitrator or of the arbitration proceedings to a party or its inability to present his case i.e. violation of principles of due process or excess by arbitrator of his authority or extra petita award and improper composition of the arbitral tribunal or irregularity in the arbitral procedure. These grounds, which are almost verbatim eliteratim of the first three grounds justifying refusal of the recognition and enforcement of awards under article V (1) of the New York Convention, also constitute grounds for the refusal of recognition and enforcement of an award. if an award is set aside on any one of the above mentioned reasons only. Unlike the New York
Convention, setting aside of an award in its country of origin on any other reason, though it is valid and permissible under its law, does not empower a court of another Contracting State(s) to refuse its recognition or enforcement. The European Convention, thus, represents a significant advancement over the New York Convention by exhaustively enumerating a limited number of grounds for setting aside a foreign arbitral award in the Contracting State(s) and giving them an exclusive importance in the matter. Article IX para 2 of the European Convention explaining the extent of applicability of these limited grounds for setting aside an award to the Contracting States that are also parties to the 1958 New York Convention limits the application of provisions of article V (1)(e) of the New York Convention solely to the cases setting aside mentioned under sub-heads (a) to (d) of its article IX (1). However, a difference be noted between the two Conventions concerning the courts competent for setting aside an award. In the system of the New York Convention, it is of no consequence whether the states envisaged in article V (1)(e) are contracting states or not, while under the European Convention setting aside of an award must be by a court of a Contracting State to have an international effect of the award.
2.03.2 The Moscow Convention of 1972

In 1972 the socialist states, which are grouped together in the Council for Mutual Economic Assistance (CMEA), entered into the Moscow Convention\textsuperscript{41} to regulate settlement by compulsory arbitration of the commercial disputes between them arising out of economic, scientific and technological co-operation contracts. It proclaims that the arbitration awards `shall be final and binding'\textsuperscript{42} and that they are to be voluntarily enforced by the parties. However, if they are not carried out voluntarily, they may be enforced in any Contracting State in the same way as final decisions made by the state courts of the country of enforcement.\textsuperscript{43} It allows refusal of enforcement on only three grounds, namely, lack of jurisdiction, denial of fair hearing and setting aside of the award.\textsuperscript{44} These grounds are closely parallel to those found in the New York Convention and the European Convention.

Its contribution lies in the fact that it not only creates a binding obligation on the contracting parties to enforce the award but also provides a force of a final judgment to an arbitral award. And thereby it eliminates other allied problems pertaining to enforcement of foreign awards.
2.03.3 The *Panama Convention of 1975*

The Moscow Convention was followed in 1975 by the Inter-American Convention on International Commercial Arbitration. Interestingly, it applies the principles of the New York Convention to Latin-American States which had not adhered to the New York Convention. It gives a force of a final judgment to an arbitral award and provides for its execution and/or recognition in the same manner that of a judgment of a national or foreign ordinary court. Recognition and execution of an award may, under the Panama Convention, be refused, only if the party against whom the award is made proves one of the five grounds enumerated in its article 5 (1). The grounds include: incapacity of the parties or invalidity of the arbitration agreement; inability of the loosing party to present his case, excess of arbitration jurisdiction; improper constitution of the arbitral tribunal or irregularity in the arbitral procedure and non-bindingness or setting aside of an award in the country of origin. It, like the New York Convention, also permits a competent authority of the State in which recognition and enforcement is sought to *ex officio* refuse recognition and execution of an award if it finds that the subject matter of the dispute cannot be settled by arbitration under its law or it would be contrary to its public policy ("order public").
It is important to note that the Panama Convention, which provides for uniform settlement of domestic and international disputes by arbitration and regulates recognition of foreign awards in the American hemisphere, was strongly influenced by the New York Convention. Indeed, the grounds listed for refusal of recognition and/or execution of an arbitral award are borrowed, more or less word for word, from the 1958 Convention.

Thus, the European Convention having as its primary objective the regulation of arbitration in East-West trade relations, has been adhered to by nineteen States, but is rarely applied. Then came the Moscow Convention, which effectively makes it mandatory for parties from member countries of the CMEA, to refer their disputes to arbitration. Finally, the Panama Convention, which broadly follows the New York Convention, came as a regional instrument.

A number of states have accepted the New York Convention as a most important international instrument to regulate recognition and enforcement of foreign arbitral awards in particular and international commercial arbitration in general. Its adherence by vast majority of states and its implementation through domestic legislations reveal its level of success. It, indeed, has been one of the factors responsible for frequent resort to international arbitration as a means of resolving international trade disputes.
III. Recognition and Enforcement of Foreign Arbitral Awards under the New York Convention: Workability and Problems

The New York Convention, which was established to increase effectiveness of arbitration in the settlement of private law disputes by securing greater uniformity in the diverse national arbitration laws in the area of recognition and enforcement of foreign awards, has not only emerged as the principal international instrument pertaining to recognition and enforcement of foreign arbitral awards but has also greatly influenced regional conventions in the area. It, in due course of time, has also been adhered to by a number of states. Almost all of the Contracting States implemented the Convention by enacting specific legislations more or less modeled on, and identical to, the provisions of the Convention. It has acquired a status of an international instrument in the field of recognition and enforcement of foreign award. It would, therefore, not be inappropriate to examine, in brief, the scheme envisaged by the Convention for easy recognition and enforcement of foreign arbitral awards and its contribution and efficacy in the field of such recognition and enforcement.
3.01 Awards within the Convention scheme

The title ‘Recognition and Enforcement of Foreign Arbitral Awards’ of the New York Convention indicates purport and purpose of the Convention. In its opening article, the Convention outlines the arbitral awards to be considered ‘foreign’ for the purpose of its recognition and enforcement. Article 1, adopting a strikingly international attitude towards enforcement of foreign arbitral awards, says:

"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

The above provision, delimiting the field of application of the Convention, stipulates two alternative criteria for defining a ‘foreign award’ namely, an award made in the territory of a State other than the enforcing State and a non-domestic award i.e. an award governed by a foreign arbitration law. The former applies to all cases where the award is made in another Contracting State while the latter concerns only with awards made in the territory of the State where the enforcement is sought and it covers the arbitral awards which, though made in the State where enforcement is
sought under the arbitration law of that State, involve a foreign or international element. However, the Convention is silent on the criteria to determine whether an award be qualified as "foreign" or "domestic" before its recognition and enforcement involves. Absence of such criteria led to different opinions regarding determination of nationality of an award.

The Convention, which ensures recognition and enforcement of an arbitral award rendered in any foreign country, whether a Contracting State or not, and non-domestic awards, proclaims the principle of universality and internationalisation of foreign arbitral awards by extending its application to the awards rendered in the contracting and non-contracting states alike for the purpose of their recognition and enforcement. However, this principle of internationalisation and universality is circumscribed by the Convention itself. Article 1 (3) allows a State, while signing, ratifying or acceding the Convention, to make two reservations, if it so wishes, to delimit application of the Convention and, in turn, its obligation arising out of it. It says:

"Any State may, on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences
arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". (Emphasis added).

The reservations provided in the provision are popularly known as 'reciprocity reservation' and 'commercial reservation' respectively. It is needless to mention that both the reservations have delimited application of the New York Convention.54 The reciprocity reservation, obviously, minimises scope of the New York Convention by allowing a State to recognise and enforce the awards made only in another Contracting State, instead of all foreign awards, wherever they may be made. However, in the light of the increasing acceptance of the Convention by the world's major trading nations, socialist, as well as capitalist, Arab, African, Asian and Latin American as well as European and North American, making the Convention increasingly international the use of reciprocity reservation will have very little impact on the applicability of the Convention. The commercial reservation, on the other hand, has allowed each Contracting State to determine for itself what relationship it considers as 'commercial' under its national law for purposes of the New York Convention. The commercial reservation obviously surrenders the Convention to lex fori of the implementing state for determining what constitutes 'commercial relationship'. Diversity in national laws
of the Contracting States leading to ununiform explanation of the term 'commercial relationship' and its varied interpretation at the hands of their national courts coupled with the absence of a satisfactory definition of commerce at international level, has created problems in operation of the reservation in the New York Convention.\textsuperscript{55} Therefore, a state, whose legal system has no generally accepted definition of what constitutes commercial contract, should, at least, make it clear that what it understands by the term 'commercial' contracts to enable the other Contracting States to know the exact extent of their obligations.

3.02 Enforcement Proceedings : Requirements

The New York Convention mandates that arbitral awards falling within its scope are to be recognised as 'binding' and be 'enforced' in accordance with the rules of procedure of the territory where recognition or enforcement is sought. The rules of procedure for enforcement of a Convention award are, thus, left to the law of the country where the enforcement is sought.\textsuperscript{56} A survey of attitudes of the Contracting States reveals the following three different approaches in regulating the procedure for enforcement of a Convention award. Australia, Botswana, Denmark, Ghana, India, Sweden, the UK and the United States have prescribed specific provisions in their respective Acts implementing the New York Convention. While F.R.Germany, Greece, Italy,
Mexico and the Netherlands provide for the same procedure for the enforcement of a Convention award as that for the enforcement of a foreign award in general. And Japan follows the same procedure for enforcement of a Convention award as that of a domestic award.\textsuperscript{57} The Convention, with the view to avoid discriminatory treatment to the "foreign awards" and the "domestic awards" and "unnecessary inconvenience" in recognition and enforcement of foreign awards, precludes the Contracting States from imposing "substantially more onerous conditions or higher fees or charges on recognition or enforcement" of such arbitral awards than are "imposed on recognition or enforcement of domestic arbitral awards."\textsuperscript{58}

The minimum conditions or formalities required to be fulfilled by the party seeking recognition and enforcement of a Convention award are simple. It is merely required to supply to the relevant court the duly authenticated award and the original arbitration agreement under which it was made. If originals are not available, duly certified copies may be supplied. If the award and the arbitration agreement are not in the official language of the country in which recognition and enforcement is sought, certified translation are also needed.\textsuperscript{59} In fulfilling these conditions the party seeking enforcement produces \textit{prima facie} evidence for enforcement of the award. And court will grant
recognition and enforcement unless one or more grounds of refusal, enumerated exhaustively in article V of the Convention, are proved by the party against whom it is invoked. It is important to note that these conditions supersede domestic law. These are the only conditions with which the party seeking enforcement has to comply with. Neither domestic law can impose additional conditions nor any agreement of the parties. However, failure to comply with them does not cause automatic dismissal of the request for enforcement. It may be cured during the enforcement proceedings. 50

3.03 Grounds for Refusal of Recognition and Enforcement

Article V of the Convention identifies and enumerates an exhaustive list of seven grounds on which recognition and enforcement of a Convention award may be refused. These are: (1) incapacity of the parties or invalidity of the arbitration agreement; (2) lack of proper notice of the appointment of arbitrators or of the arbitration proceedings or violation of due process; (3) inapplicability of the arbitration agreement to the dispute or an arbitral decision on a matter not covered by the submission to agreement or extra or ultra petita award; (4) improper composition of the arbitral tribunal or irregularity in the arbitral procedure;
(5) suspension of the award or its failure to become binding in the country of its origin;
(6) non-arbitrability of the subject matter as per its lex fori; and
(7) violation of public policy or ordre public of the lex fori.

Refusal of recognition and enforcement of a foreign award on the first five grounds depend on the proof presented by the party resisting enforcement of the award once the party seeking the enforcement has established a prima facie case by producing documentary evidence of the arbitration agreement and the award. While the last two grounds, if local law permits, allow a court to deny recognition and enforcement sponte sua.

The conditions of enforcement of an award in the 1958 Convention are considerably more favourable to the party seeking enforcement than the conditions of the 1927 Geneva Convention, its predecessor. The following three main features of these grounds deserve mention. First, it shifts onus probandi from the party seeking enforcement to the opposing party to establish existence of the alleged grounds to block enforcement of an award. His request for not enforcing the award cannot be granted if he fails to supply satisfactory evidence of existence of the claimed ground(s) for such refusal. Secondly, the grounds enumerated in article V are exhaustive. It, therefore, precludes an
obstructionist party to oppose enforcement of an award on ground(s) other than the listed one in article V and allows the enforcing court to refuse enforcement ‘only if’ the party against whom the enforcement is invoked proves one of the grounds mentioned in article V (1) (a) to (e), or if the court finds that the subject matter of the difference is non-arbitrable according to its lex fori or the enforcement would violate its public policy under article V (2) (b). Thirdly, these grounds supersede domestic law concerning the enforcement of foreign awards. The Convention does not permit an enforcing court to review merits of the arbitral award. However, the principle is not unfettered as it may scrutinise the award with a view to verifying whether an objection(s) raised by the resisting party is (are) adequate and justifiable to refuse the requested enforcement. 61

It should be noted that these main features reflecting ‘pro-enforcement bias’ of the Convention, are almost unanimously affirmed by the courts of the different Contracting States while interpreting them. 62

Against this background an examination, in brief, of each of the grounds allowing denial of recognition and enforcement of a foreign award, with a view to appreciating and evaluating efficacy of the scheme envisaged in the 1958 Convention, is attempted herebelow.
As mentioned earlier, first paragraph of article V sets out five grounds for refusal of recognition and enforcement of a Convention award if proof of one of the grounds is furnished by the party against whom the award is invoked while the second paragraph sets out two additional grounds for refusal of recognition and enforcement allowing an enforcing court to deny recognition and enforcement of a foreign award on its own. These grounds can, therefore, be conveniently discussed under the following two broad heads:

(I) Grounds for refusal of recognition and enforcement to be proved by the respondent, and

(II) Grounds for refusal of recognition and enforcement ex-officio.

3.03.1 Grounds for refusal of recognition and enforcement of award to be proved by the respondent

The opening sentence of article V makes it amply clear that the ground(s) listed in its paragraph (I) has (have) to be proved by the reluctant party to block recognition and enforcement of an award. It says:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, where the recognition and enforcement is sought, proof that --- " (emphasis supplied).
3.03.1.1 Incapacity of the parties or invalidity of the arbitration agreement

Sub-paragraph (a) of para 1 of article V provides for denial of recognition and enforcement of an arbitral award if the parties, according to law applicable to them, were incompetent to conclude the arbitration agreement or the arbitration agreement is invalid under the law to which the parties have subjected to, or in its absence according to the lex loci arbitrii. These two objections to recognition and enforcement of an award are based on the premise that an award derived from a defective agreement does not deserve enforcement.

3.03.1.1(a) Incapacity of the parties

Absence of any specification of a system of law relevant for determination of capacity of a party or guidelines for its identification unequivocally refers the matter to the conflict of rules of the state where the enforcement is sought. The conflict of rules obviously vary from country to country depending upon its recognition to nationality, domicile, habitual residence or any other appropriate connecting factor for determination of ‘personal law for the capacity of a natural person’. And in case of a legal person the criteria may range from the place of ‘incorporation’ to the place of ‘business’. The relevant system of law, therefore, depending on the circumstances, will be
either the 'proper law' of arbitration agreement or the law of a party's domicile, residence or nationality. A commentator, however, opines that the phrase 'under the law applicable to them' preceding to 'under some incapacity' in article V (1) (a) gives a half-way conflict rule since what is to be considered as personal law is to be determined by the conflict rules of the forum. He further emphasizes that 'the specific mention of the applicable law in respect of incapacity of a party to conclude an arbitration agreement underscores that the capacity of a party is not necessarily to be determined under the same law as the law applicable to the arbitration agreement'.

It is significant to note though the Convention speaks of incapacity of the 'parties', incapacity of any of the parties to the arbitration agreement is sufficient to refuse recognition and enforcement of an award. It is, therefore, not necessary to confine the provisions of the article to capacity of the party seeking enforcement of an award. A party objecting enforcement may adduce evidence of its own incapacity to resist enforcement of an award.

3.03.1.1 (b) Invalidity of an arbitration agreement

Invalidity of an arbitration agreement as a ground for refusal of recognition and enforcement of an award, which generally involves determination of several
related issues such as presence of a valid and binding agreement; arbitrability of the dispute; presence of an element of fraud or duress etc. is determined with reference to the law governing the arbitration.

Article V (1) (a) contains two conflict rules for determining the law governing the arbitration agreement. The first rule is the primary rule of party autonomy, which gives a free hand to the parties to designate the law applicable to the arbitration agreement. The second rule is a subsidiary rule according to which the arbitration agreement, failing a choice of law by the parties, is governed by the law of the country where the award was made. The primary rule of specific choice of law leaves no room to the enforcing country to apply any other law, even where the choice appears capricious and lacks any genuine basis or is designed to avoid some mandatory provisions of the law which would otherwise apply. It is probable that refusal of enforcement could be justified in these circumstances on the ground of violation of public policy of the lex fori. The subsidiary rule which permits application of the lex loci arbitrii in absence of specific choice of law, clearly intends to govern validity of an agreement only when the parties' intentions are not capable of being determined.

It should be re-emphasized that it is a well settled interpretation that validity of an arbitration
agreement, including its formal validity, has to be judged solely on the requirements of article II\textsuperscript{66} which prevails over national laws and precludes the Contracting States to evolve less or more demanding requirements than embodied in it.\textsuperscript{67} Therefore, the matters regarding the form of the arbitration agreement are not to be determined under either the law governing the arbitration agreement or lex fori of the enforcing court but under the uniform rule of article II (2) and its non-compliance may constitute a ground for refusal of enforcement of the award.\textsuperscript{68}

3.03.1.2 Violation of principles of due process

Article V (1) (b) provides for denial of recognition and enforcement of a foreign award if the defendant proves that he was "not given proper notice ... or was otherwise unable to present his case". The provision requires that the party against whom the award is invoked was properly notified of the appointment of the arbitrator and of the arbitral proceedings. The question when a notice can be considered as "proper", obviously depends on facts and circumstances of each case. The determining criteria of a "proper notification" is not its "form" or "manner of communication" but its "adequacy of means of communication" of the appointment of the arbitrator and the arbitral proceedings. Similarly the time limits for
the appointment of an arbitrator as well as the preparation of the defenses and notice period to appear at the hearing should not preclude a party from appointing his arbitrator, preparing his defence or appearing at a hearing. If it does it amounts to improper or insufficient notice for the purpose of article V (1) (b). Recently, the Italian Supreme Court has held that the party objecting the enforcement of an award on the ground of insufficient notice must prove that he actually had been unable to present his case and a mere assertion that the time period between the notification and the hearing date was too short for preparing and filing its defence is not adequate to deny enforcement of an award.89

The provision, which recognise the principle of ‘fair opportunity to be heard’ of a party, sets basic standards of due process by requiring proper notice of the appointment of the arbitration and of the arbitration proceedings and by ensuring the party’s ability to present his case. It attaches specific importance to the fundamental requirements of a fair hearing i.e. audi et alteram partem and insists observance of the principles of natural justice as a vital pre-requisite to the validity of an arbitral proceedings. It seems that it is based on the well settled and universally accepted principle that arbitrators must observe the principles of equity and
justice and fundamentals of fairplay in administration of arbitral justice.\textsuperscript{70}

However, the Convention is silent about the law to be applied to determine violation of due process. The omission, it has been argued, is deliberate one with a view to setting an international standard of fair hearing in very general terms by leaving an enforcing court a wide discretion to decide it on factual circumstances.\textsuperscript{71} It is important to make mention of article V (1) (d) which \textit{inter alia} gives freedom to the parties to stipulate arbitral procedure and in its absence it should be regulated by the \textit{lex loci arbitrii}. Against this background a question arises : under which law - law determined by the parties or \textit{lex loci arbitrii} or \textit{lex fori} of the enforcing court - the standards of due process are to be judged ? It has been argued that the law agreed upon by the parties for governing the arbitral procedure should not be taken into account for article V (1) (b) is a corrective measure on such arrangement of the parties.\textsuperscript{72} It has also been argued that article V(1)(b) constitutes a truly international rule and is, therefore, outside the reach of any domestic law.\textsuperscript{73} This opinion is prompted by the desire to discard the law of the forum which may contain parochial requirements for an orderly procedure. However, the authors who adhere to the opinion add that the judge before whom enforcement of the award is sought
should find his inspiration in the notions of due process under his own law. In fact, a U.S. court while considering the defence of violation of due process as a ground for refusal of enforcement of an award stated "[T]his provision, essentially, sanctions the application of the forum state's standards of due process". The statement is often quoted as a precise object of article V (1) (b) and has been affirmed in a number of decisions. However, a review of reported court decisions involving defence of violation of due process reveals that the enforcing courts, which have accepted the defence in very serious cases, have invariably taken the position that a violation of domestic notions of due process does not necessarily constitute a violation of due process in case where the award is foreign. Even a serious violation of due process does not justify refusal of enforcement if it is convinced that the arbitral decision would not have been different had the irregularity not covered.

Violation of due process may be conceived as a matter pertaining to public policy of the forum. A question as to mutual relationship between article V (1) (b) concerning due process and article V (2) (b) dealing with general public policy arises. To put it precisely: does the specific provision of article V (1) (b), in effect, exclude due process from article V (2)(b) ?
This question is important because if due process is only covered by article V (1) (b) a enforcing court will not be allowed to refuse enforcement of the award on its own motion even if it finds that award is tainted by a serious violation of due process, it can do so, only if the respondent asserts and proves it. Van den Berg takes a position that violation of due process falls either under article V (1) (b) or V (2) (b) and article V (1) (b) neither limits scope of article V (2) (b) nor it excludes violation of due process, as a violation of public policy, from article V (2) (b). It, therefore, does not preclude a court to refuse recognition on its own finding of violation of due process by virtue of article V (2) (b). Article V (1) (b), according to him, merely signifies that if a respondent alleges a violation of due process, it is he, and not the claimant, who has to establish the violation by furnishing proof. 78

The provision requires proper notice of the appointment of the arbitrator and of the arbitration proceedings and the partie’s ability to present his case to ensure the recognition and enforcement of the resulting award. Procedural questions relating to notice, however, are to be determined by reference to the agreed arbitration process. Where the process have not been agreed reference will, presumably, be made to the law governing arbitration. If these legal
requirements are fulfilled in respect of notifying the appointment of the arbitrator or the proceedings to the party in question it seems unlikely that 'want of proper notice' will be readily established. But in the absence of such 'proper' procedural stipulation a notice to be a 'proper notice' must be reasonable and adequate. The question when a notice can be considered as proper is a question of fact.

Arbitration being a private settlement of disputes, the notice need not be in a specific form. What is required is that the contents and the notice period should not preclude a party from appointing his arbitrator and preparing his defence or appearing at a hearing. The phrase "otherwise unable to present his case" figured in article V (1) (b) lays down the principle of equal opportunity to be heard. The equal opportunity to be heard ensures that a party must have been effectively offered the opportunity to be heard and implies that the arbitrator must inform a party of the arguments and evidence of the other party and allow the former to express an opinion thereon. The ground allows a party to assert that he has not had an adequate opportunity to be heard, particularly if the arbitrator has shown partiality in his treatment of that party. And it also covers cases of serious irregularity in the arbitral proceedings including force majeure and the like circumstances. It is needless to mention that a
party who has refused to participate, or remains inactive, in the arbitration after having been duly notified, generally, cannot invoke article V (1) (b), or article V (2) (b).

A survey of court decisions involving defence of a violation of due process demonstrates that inability of defendant to present his case is normally a question of fact and the enforcing courts have accepted the defence in very serious cases only. The defence of violation of due process, therefore, has not proved very useful for parties opposing enforcement of awards. 79

3.03.1.3 Excess of Arbitrator’s Authority or extra or ultra petita award

Recognition and enforcement of an award may be refused under article V (1) (C) if it deals with a difference, not contemplated by or not falling within the terms of the submission to arbitration or contains a decision on a matter, beyond the scope of the submission to arbitration. It, however, allows recognition and enforcement of ‘that part of the award’ containing decisions on matters submitted to arbitration if it is possible to separate the decisions on matters submitted to arbitration from those not so submitted. It deals with denial of recognition and enforcement of award containing decisions in excess of the arbitrator’s authority and provides for possibility
of fragmentation of an award into *intra vires* and *ultra vires* and partial enforcement of its valid part. The purpose of the ground therefore is to prevent enforcement of awards where (a) the arbitrators dealt with a difference which was not covered by the terms of the original agreement or, if it was, was not covered by the terms of the actual reference; and (b) the arbitrators have included in the award a decision on a matter which was not within the scope of the original agreement, or, if it was, was not within the scope of the actual reference. When enforcement of an award is objected on this ground it is therefore necessary to determine, by construction, the intended limits of the arbitration agreement or reference or the extent to which the arbitrators may determine their jurisdiction. The burden of proving any excess jurisdiction lies on the person intending to resist enforcement of the award. 80 However, the Convention has not given any guidance as to determining the choice of law for this purpose. Presumably, the enforcing courts apply their own conflict of laws rules governing questions of constructions.

The ground, thus, goes to yet another fundamental principle of arbitration law. The authority of an arbitrator is derived from the arbitration agreement and therefore an arbitrator has no authority to determine matters beyond those specified in it nor to pronounce
upon matters not specified therein. Such matters are ultra vires the arbitration agreement and to that extent it is void and unenforceable.

3.03.1.4 Improper composition of arbitral tribunal or irregularity in the arbitral procedure

Recognition and enforcement of an award may be refused under article V (1) (d) if the respondent proves that composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. Article makes it amply clear that in assessing a defence based on either of the grounds the court should be guided, in the first place, by the agreement of the parties and only failing such agreement on these matters, by the law of the country where the arbitration took place as a secondary criterion. The parties may agree upon such matters either directly by incorporating a provision in the arbitration agreement or, indirectly, through a choice of law clause whereupon composition and procedure of the arbitral forum is governed by the chosen system of law. Article V (1) (d), unlike its equivalent provision of the 1927 Geneva Convention,\textsuperscript{81} gives prime importance to arbitration agreement in the matters of composition of arbitral tribunal and arbitral procedure and reduces role and importance of the lex loci arbitrii in the
enforcement proceedings in other Contracting States. It accordingly does not allow denial of enforcement of an award rendered by a improperly constituted arbitral tribunal or irregularity in its procedure under the lex loci arbitri if the composition of the arbitral tribunal and its procedure was in accordance with the parties' agreement. It also, unlike its predecessor, does not insist for compliance of the arbitral tribunal or arbitral procedure with both the arbitration agreement and law of the country where arbitration took place. Therefore, merely non-compliance with the law of the place of arbitration in the matters of composition of a tribunal or its procedure does not justify refusal of enforcement under the 1958 Convention if these matters are dealt with in accordance with the arbitration agreement. However, refusal based on infringement of the lex loci arbitri in the matter of composition of a tribunal and/or its procedure may be allowed if the arbitration agreement is silent about composition of the arbitral tribunal or its procedure. However, it is not completely clear whether the parties autonomy to select any procedural law is unrestricted or circumscribed. The vagueness coupled with the Convention's far going affirmation of contractual freedom in stipulation of procedure, or selection of a legal system to control an arbitration and the award resulting therefrom raises a few pertinent questions
namely: does it allow parties to stipulate any procedural law of their choice completely independent of, and unconnected to, the procedural rules of the country of arbitration?; does it allow parties linked to a country by the powerful ties of nationality, residence or place of business to stipulate a procedural law of another country which bears a manifestly tenuous relation thereto?; Is an enforcing authority required to recognise such expression of an intention as conclusive, to the total exclusion of considerations of the accepted notions such as fraud, forum non conveniens?; does it allow parties to revive the concept of an 'international award'—an award completely independent of national laws—the idea launched by the ICC in its Draft Convention of 1953 and disapproved in the ECOSOC Draft Convention of 1955 and ultimately failed to occupy a place in the final text of the 1958 New York Convention? and, what is the role and relevance of the law of the country where arbitration took place in the arbitral procedure?

The relevant articles of the Convention furnish little guidance on the subject. Some commentators, drawing support from phraseology of the paragraph itself and the travaux préparatoires, feel that parties may agree to procedures completely independent of national laws. The Private International Law Committee also admits that article V(1)(d) empowers parties to
ignore procedural rules of the country of arbitration and to that extent revive the ICC conception of an ‘international award’. But, according to it, article V (1) (a) requires an agreement to be valid under some system of national law and therefore arbitration is subjected to that law, and it feels that parties' freedom is not unfettered as it might be implied from the provision. The parties' autonomy in the selection of procedural rules, therefore, must be consistent with that law. A view has also been expressed that parties' autonomy in determination of an arbitral procedure is limited by the public policy ground figured in article V (2) (b) as no court would be willing to recognise or enforcing a foreign award that transgresses its notions of public policy or violates principles of natural justice. And under the 1958 Convention a national court retains a safeguard in its power to refuse recognition or enforcement on these grounds. Van den Berg, in the absence of any indication on the point in intensive debate on the provision, assumes that the idea of an arbitral award completely independent of any arbitration law was rejected by the majority of the delegates to the New York Convention. He opines that notwithstanding the supremacy of the parties' agreement under article V (1) (d), the arbitral procedure, along with composition of arbitral tribunal, is subjected to the fundamental requirements of due process.
The historical antecedents, textual analysis and the accepted interpretation of article V (1) (d) disclose the desire of the drafters of the 1958 Convention to reduce the role of *lex loci arbitrii* in enforcement proceedings in other Contracting States, and its conformity in arbitral proceedings is to be considered only if parties to an arbitration agreement have failed to stipulate the arbitral procedure. However, this does not mean that *lex loci arbitrii* is totally irrelevant in enforcement proceedings even in the matters covered by article V (1) (d), viz., composition of arbitral tribunal and arbitral procedure. Its role may be either subsidiary or complementary. It is subsidiary when parties have not provided anything regarding composition of the arbitral tribunal and/or its procedure. It is complementary when it is used to fill lacunae in those aspects not provided for by the parties in their agreement. A few points deserve mention: first, the subsidiary and complementary role of the *lex loci arbitrii* becomes operative only when enforcement of an award is sought in a Contracting State other than the country of origin. Secondly, even violation of a mandatory provision of the arbitration law of the country of origin in respect of the composition of the arbitral tribunal and arbitral procedure does not affect the enforcement proceedings in another Contracting State. It, however, may lead to a
setting aside of the award in the country of origin. It is, therefore, not a defence under article V (1) (d) that the agreed composition of the arbitral tribunal or the arbitral procedure was in violation of a mandatory provisions of the law governing these matters. Thus, one notices an interesting situation that in most cases the agreement of the parties on the composition of the arbitral tribunal and/or the arbitral procedure is subjected to the law of the country where arbitration took place while by virtue of article V (1) (d) that law is not to be taken into account in the enforcement proceedings in another Contracting State even if its mandatory provisions are violated. The idea behind this system, as mentioned earlier, is to reduce the role of the lex loci arbitri in enforcement proceedings.

The preceding discussion and broad enabling terms employed in the relevant articles of the New York Convention lead to an unavoidable conclusion that the only proper limits on contractual autonomy of the parties are those imposed by the public policy of the enforcing country. Such an extensive contractual freedom given to parties, subject to the above mentioned limitation, to stipulate the law governing composition and procedure of their arbitral authorities, it seems, is not to strike at once the existing differences and
shortcomings of municipal procedure by direct means of reformation or unification but to generate a tendency in this direction. 87

3.03.1.5 Award not binding, suspended or set aside

Under article V (1) (e) recognition and enforcement may be refused if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country by which or under the law of which that award was made. The provision, in fact, provides, in the first place, for refusal of an enforcement of an award if the respondent proves that the award has not yet become 'binding' on him and the claimant of the enforcement, or, in the second place, it has been 'set aside' or 'suspended' by a 'competent authority' in the country of origin.

3.03.1.5(a) The award has not yet become binding

The legislative history unequivocally discloses the fact that the term 'binding' used in article V (1) (e) replaces the word 'final' figuring in the corresponding provision of the 1927 Geneva Convention. Under the Geneva Convention an award had to be 'final' in the country where it was made in order to be enforceable abroad, and an award was considered not 'final' if it was open to opposition, appel or pourvoen.
cassation or proceeding ' contesting its validity ' was pending in the country of origin. A party seeking enforcement of an award, therefore, had to prove that the award had become 'final' in the country of origin. In practice this could be proven only by producing an exequatur (leave for enforcement or the like) from the country in which it was made and he had also to obtain a leave for enforcement from a court of the country in which he sought its enforcement to make the award 'enforceable in its country as an award is not self-executing. The term 'final' was, therefore, generally interpreted as a requirement of 'double exequatur', requiring a leave for enforcement from the country where the award was made as well as from the country of enforcement. The New York Convention, realising the 'too cumbersome' incumbent on a party seeking enforcement of an award, had done away with the so-called 'double exequatur' by substituting the term 'final' by the term 'binding' in article V (1) (e). The use of term 'binding' was deliberate first, to avoid any reference to 'finality' of an award and to eliminate thereby resulting system of 'double exequatur' from the enforcement proceedings and secondly, to make it clear that an award could be given legal effect without need to comply with local enforcement requirements in the country of origin.88
Although the term ‘binding’ is not defined in the Convention available literature indicates that an award is ‘binding’ when it resolves all of the issues and if it is not open to ordinary means of recourse, such as appeals to a court or to another arbitral tribunal. And its binding nature remains unaltered by either intended appeal; pendency of an appeal or an action to set aside in a court of law; or possibility of future arbitration between the parties. Neither mere recourse to such means nor its judicial confirmation in its country of origin to make it enforceable prevents it (award) from being “binding.” Similarly, mere assertion by a respondent that the award in question has yet not become binding is not enough to refuse its enforcement but the respondent has to prove that the award has not yet become ‘binding’ on the parties for denial of enforcement.

National courts, however, differ in their approach to the question as to which moment an award can be considered to have become ‘binding’ under article V (1) (e). A few courts take the position that ‘binding force’ is to be determined under the law applicable to the award while others feel that it should be determined in an autonomous manner independent of the applicable law. First approach obviously involves a search by the enforcing court for the law applicable to the award and for ‘binding’ character of the award under
that law. The law applicable to the award, according to article V (1) (e), is the law of the country in which, or under the law of which, that award was made. Courts appear to search under the applicable law for the moment at which the award can be considered to be inchoate for enforcement in the country of origin or for an equivalent of the term `binding' under the arbitration law of the country of origin. The second approach, on the other hand, asserts that the term `binding' should be interpreted without reference to its applicable law as far as elimination of the double exequatur is concerned.

The first approach ultimately leads to a search for necessary conditions stipulated under the law applicable to the award to make it `binding' or its equivalent terms such as inchoate for enforcement; ready for enforcement; `enforceable'; `capable of enforceable'; `deposition' in, or `confirmation' by, a court of law etc. used under that law. It may be mentioned that the reasonings and the decisive factors determining the moment at which an award can be `binding' or its equivalent in the country of origin vary from the law to law. A system of law may or may not provide for a leave for enforcement of an award in the country of its origin to give it a `binding' character while another may insist for `deposition of an award with a competent court at a place of arbitration' or its `confirmation'
by a court of law, as a pre-requisite for the binding force of an award. The court requested to enforce an award would presumably ask for convincing evidence to show that the requested award satisfies all the necessary conditions to make it ‘binding’. The second approach, which emphasizes an autonomous interpretation of the term ‘binding’, not only eliminates the so-called system of *double exequatur* from the enforcement proceedings, but also relieves an award from compliance with the unnecessary and cumbersome local requirements to make it ‘binding’. Arguments in support of the autonomous interpretation, therefore, are that if the applicable law provides that an award becomes ‘binding’ only after a leave for enforcement is granted by a court, the *double exequatur* is, in fact, reintroduced into the Convention, thus, defeating the Convention’s attempt to abolish this requirement.

However, prevailing judicial interpretation reveals that the courts, generally, resort to the law applicable to the award to find its ‘binding’ character and determine the ‘moment when the award becomes inchoate for enforcement’, or when it fulfills the conditions of a term equivalent to the term ‘binding’ under the arbitration law of the country of origin. Recently, the Supreme Court of India, in *Oil & Natural Gas Commission v. Western Company of North America* held that enforceability of an award must be determined
in accordance with the law applicable to it. It, commenting on the term 'binding' has observed:

"The expression 'not yet become binding on the parties' postulates that the Convention has visualised an award which becomes binding at a point of time later than the making of the award. In other words the provision has in its contemplation the fact that an award in some cases may become binding only at a later stage. If this was not so, there was no point in using the expression 'not yet become binding'. The award which is sought to be enforced as foreign award will have thus to be tested with reference to the key words contained in article V (1) (e) of the Convention and the question will have to be answered whether the award has become binding on the parties or has not yet become binding on the parties. It is evident that the test has to be applied in the context of the law of the country governing the arbitration proceedings or the country under the law of which the award was made.103

The Supreme Court of India to support its above conclusion extensively quoted and relied upon certain rulings of the Italian, French and German courts cited and commented upon by Van den Berg,104 and to draw two propositions, namely, the enforceability must be determined as per the law applicable to the award and the French, German and Italian courts have taken the view that the enforceability as per the law of the country which governs the award is essential pre-condition for asserting that it has become binding under article V (1) (e).105

339
Most of the authors\textsuperscript{106} are also of the view that the moment at which an award becomes binding within the meaning of article V (1) (e) is to be determined under the law governing the award.

However, one should not overlook the fact that under the 1958 New York Convention an award becomes ‘binding’ as soon as it is rendered and it is not required that it should have become ‘enforceable’ in the country where it was made. Such unenforceability of an award in the country of origin does not prevent it from becoming ‘binding’. An award to be ‘binding’ under article V (1) (e), as mentioned earlier, is sufficient if it becomes \textit{effective} (distinct from being \textit{enforceable}) between the parties. Further, determination of the moment when an award becomes ‘binding’ under the law governing the award leads to different results due to diverse grounds/consideration rendering ‘binding’ character to it under different systems of law.

Against this background, it may be questioned whether the law governing the award should be referred to, and relied upon, for interpreting the term ‘binding’ of article V (1) (e) ? The question becomes pertinent in the light of prevailing almost uniform judicial interpretation of the term ‘binding’ to the effect of elimination of double exequatur from the enforcement proceedings.\textsuperscript{107} Legislative history of article V (1)
(e) and travaux préparatoires of the New York Convention also unequivocally disclose that the term 'binding' is to be conceived independent of the law governing the award in so far as the elimination of the double exequatur is concerned.\textsuperscript{108} Thus, an autonomous interpretation of the term 'binding' fits better in the spirit and system of the 1958 Convention than reference to the law applicable to an award. Pieter Sanders, an expert of international repute in the field of international commercial arbitration and one of the distinguished participants in the deliberations of the New York Convention has rightly observed:

"I doubt whether we have to fall back on arbitration law of the country where the award was made for interpretation of 'binding' in the New York Convention. The Convention contains a reference to the arbitration law of the home country of the award only in connection with the next item of ground (e), the setting aside ... Application of national arbitration law even in those countries which require an exequatur in order for domestic award to become binding, would lead to the double exequatur, a situation the New York Convention expressly sought to avoid."\textsuperscript{109}

A commentator in his acclaimed treatise on the New York Convention also observed:

"The use of the specific term 'binding' in the Convention indicates that it is to be conceived independent of the law governing the award in so far as the elimination of double exequatur is concerned ... The text of article V (1) (e) conspicuously does not link the term
'binding' with the law applicable to the award, as it does on the other hand in the second part of this provision in respect of the setting aside and suspension of the award."\textsuperscript{110}

An acceptance of the above mentioned autonomous interpretation of the term 'binding' as a correct interpretation of article V (1) (e) leads to a logical query, namely why it not then be extended and applied to all the issues pertaining to binding force of an award including the question as to the 'moment' rendering it a 'binding' character for the purpose of article V (1) (e)? Van den Berg, in the light of legislative history of article V (1) (e); phraseology of article V (1) (e) and VI and mutual relation between the second part of article V (1) (e) and article VI, argues that there is scope for autonomous interpretation of the term 'binding' for determining the 'moment' at which an award becomes binding within the meaning of article V (1) (e).\textsuperscript{111} He further rightly opines that the results of such autonomous interpretation are that an award becomes 'binding' at the moment it is validly rendered in the country of origin and dispenses with difficult inquiries to the moment when it is 'ready for enforcement' or equivalent of the term 'binding' under the law governing the award. However, he admits that the law governing the award is relevant in ascertaining whether the award is open to a genuine appeal on the merits to a court of law or not.\textsuperscript{112}
In the background of the objects and legislative intention of the New York Convention the approach of Professor Pieter Sanders and Van den Berg seems to be a 'proper approach' to solve the most difficult question in the enforcing courts of handling of an award which has not been set aside but subject to review in the rendering State.

3.03.1.5 (b) The award set aside or suspended

The second part of article V (1) (e) further provides for refusal of enforcement of an award which has been 'set aside' or 'suspended' by a competent authority of the country in which or under the law of which it was made. And article VI of the Convention allows an enforcing court, if it thinks proper, to adjourn its decision on the enforcement of the award if the respondent has applied for its setting aside or suspension in the country of origin. The grounds for refusal of recognition or enforcement mentioned in the second part of article V (1) (e) are applicable only when the award has been effectively set aside or suspended in the country of origin113 and merely making an application for setting aside or suspension of an award in the country of origin does not allow refusal of its enforcement. It, however, may call only for adjournment of the decision on the enforcement. The scheme of the Convention and prevailing judicial
interpretation unequivocally make it clear that an award can only be set aside or suspended by a competent court of the country of origin in accordance with its arbitration law or the law under which it (award) was made. A court in the country of origin, and not an enforcing court, has the exclusive competence to decide on the action of setting aside or suspension of an award. An enforcing court, under the Convention, can only refuse to recognise or enforce it in its country.

It is interesting to note that the New York Convention, unlike the European Convention of 1961 and the UNCITRAL Model Law on International Commercial Arbitration of 1985 does not enumerate the grounds on which an award may be set aside. It is also not applicable in the setting aside proceedings. It thus, surrenders to the country of origin and its arbitration law for setting aside of an award. This proposition, in effect, accepts the principle that a foreign award in its country of origin may be set aside on any grounds other than those mentioned in clauses (a) to (d) of article V (1). A losing party, therefore, may obtain an order setting aside of an award even on grounds not mentioned in article V of the Convention in the country of origin and may subsequently resist its enforcement on ground (a) of article V (1) thereby indirectly introducing these grounds as grounds for refusal of enforcement under the Convention. Such indirect
inclusion of the diverse and varied grounds for setting aside contained in the different national arbitration laws, which do not necessarily conform to those mentioned in article V (1) of the 1958 Convention, not only undermines the limitative character of the grounds for refusal of enforcement of an award¹¹⁷ but also leads to an inappropriate¹¹⁸ and unjustified refusal of enforcement.

With a view to avoiding such unwarranted extension of article V (1) (e) and thereby resulting unexpected and undesirable consequences it has been suggested by no less an authority on international commercial arbitration than P. Sanders that the grounds for setting aside of an award in the country where awards are made, following the European Convention of 1961 as an example, be limited to those grounds mentioned in clauses (a) to (d) of article V (1) of the 1958 Convention. He, however, admits that the proposed modification involves a reconsideration of the scope of the New York Convention, which now applies to arbitral awards made in the territory of a State other than the State where recognition of such award is sought.¹¹⁹ Van den Berg, who concedes this shortcoming as a "defect of the Convention" but "without any practical difficulties"¹²⁰ reacted to this modification, surprisingly without referring to the view of P. Sanders, as under:

336
"...[I]t would constitute a far reaching change of the New York Convention as it would mean that the latter (the New York Convention) is to be made applicable in the country of origin, which is presently not the case. Such a change, which may create many complex problems, is, in my view, unnecessary for the time being, since, as noted, the possibility offered by the New York Convention to have an award set aside in the country of origin on all grounds contained in its arbitration law, is in practice not a problem of such magnitude as it theoretically appears to be."121

The viewpoint of P. Sanders is aimed at bringing uniformity and certainty in setting aside of awards in the country of origin and uniform interpretation and application of article V (1) (e) in the Contracting States. The view is certainly in conformity with the basic scheme outlined in the 1958 Convention and its proclaimed objective of the uniform judicial interpretation in the field of recognition and enforcement of foreign arbitral awards in the Contracting States. If it, as argued by Van den Berg, results in application of the Convention to the country of origin one may suggest an intermediary solution viz. let an award be set aside on any ground in its country of origin but for the purpose of its recognition and enforcement setting aside only on the grounds enumerated in article V be accepted. This would eliminate an indirect extension of particularities of national arbitration laws. It is important to note that the
UNCITRAL, which was established to play a more active role in reducing/removing legal obstacles for smooth flow of international trade, incorporated in its Model Law on International Commercial Arbitration of 1985 a restrictive list of grounds for setting aside of an award. These grounds are similar to those enumerated in article V (1) of the 1958 Convention. It is interesting to note that the UNCITRAL, with a view to retaining exclusive characteristics of the list, has rejected the suggestion of making a non-exhaustive list of grounds enabling inclusion of unforeseeable grounds in future. Further, the argument of Van den Berg seems illogical and unconvincing when one recalls an accepted principle that 'law' should address to the all probable issues to make it 'certain', 'operative' and 'unambiguous'. No convincing and appealing reasons for non-applicability of this principle to article V (1) (e) of the Convention have been put forth by him.

Refusal of an award under the second part of article V (1) (e) is justified only when it has been set aside by a competent authority of the country in which or under the law of which it was made. Though, the Convention has neither defined nor hinted at the explanation of the term competent authority, the enforcing courts have unanimously taken the view that the competent authority according to the Convention is the competent court of the country in which or under
the law of which the award was made and it is exclusive competent to decide on an action for setting aside an award.

The second part of article V (1) (e) also provides for refusal of enforcement of an award which has been suspended by a "competent authority" of the country in which or under the law of which it was made. For successful refusal of an enforcement a respondent must prove that the suspension of the award has been effectively ordered by a court in the country of origin. And its automatic suspension by operation of law in the country of origin is not sufficient for refusal of enforcement under article V (1) (e)\(^\text{124}\) Similarly, mere moving an application for suspension of an award in the country of origin is not adequate for denial of its enforcement.\(^\text{125}\) It may, by virtue of article VI, lead to an adjournment of decision on its enforcement.

Appreciating the view of the Swedish Supreme Court that an automatic suspension of an award by operation of law in the country of origin is not sufficient for refusal of enforcement of an award under article V (1) (e) of the Convention P. Sanders rightly observed:

"If such automatic suspension were sufficient for "has been suspended" as provided in article V (1) (e), it would defeat the system of the Convention. It would mean that by a mere application for setting aside the award in the country of origin - often prompted by the wish to delay enforcement

339
enforcement would have to be refused under the Convention in other Contracting States. This obviously runs counter to the reason behind the term "binding" in article (v) (1) (e) and the adjournment provisions in article VI." 126

Recently, the District Court of Amsterdam, the Netherlands, in SPP v. Egypt 127 following Gotaverken, opined that the principle underlying the text of the Convention is that a judicial authority must have had the opportunity to consider the question whether a request for suspension is made for good cause or not.

The above interpretation of the phrase "suspended by a competent authority" is in conformity with the intent and content of article V (1) (e). If suspension by operation of law were to be read into the Convention as a ground for refusal of enforcement article VI, contemplating discretionary adjournment of decision on the enforcement when a respondent applies for setting aside or suspension of an award, would be rendered meaningless as the suspension which lead to the refusal of enforcement.

3.03.2 Ex-officio refusal of recognition and enforcement

Apart from the objections to the enforcement of a foreign award enumerated in clauses (a) to (e) of article V (1), article V (2) provides for two additional grounds for denial of recognition and enforcement of a foreign award. The recognition and enforcement of a
foreign award under article V (2) may be refused suo moto by a competent authority in the country where recognition and enforcement is sought if the subject matter of the award is non-arbitrable under its lex fori or its recognition or enforcement would be contrary to its forum’s public policy or ‘ordre public’.

It is well to remember that refusal of recognition and enforcement of a foreign award by a receiving court on any of the grounds enumerated in clauses (a) to (e) of article V (1) is allowed only when the resisting party asserts them and proves their existence. The grounds mentioned in clauses (a) and (b) of article V (2) justifying denial of recognition and enforcement, on the other hand, need be neither asserted nor proved by the obstructionist party. A receiving judge may suo sponte or ex-officio refuse recognition and enforcement of a foreign award if he finds that the subject matter of the dispute would not be capable of settlement by arbitration in his country or such recognition and enforcement would be contrary to the public policy of his country.

It is an accepted principle that the domain of non-judicial dispute resolution, i.e. arbitration, cannot be left unregulated and to the free disposal of the parties. National arbitration laws, therefore, generally restrict the domain of arbitration by
excluding certain categories of disputes from the purview of arbitrators and exclusively reserving them for the jurisdiction of their national courts. The non-arbitrability of certain subject matters depends upon the extent of a State's special interest in judicial rather than arbitrable resolution of a dispute and permissible limits of parties' autonomy to resort to arbitration as a dispute settlement mechanism. Similarly, a national court would not readily give its 'fiat executio' i.e. leave for enforcement, of an award when it would be violative of fundamental rules of its public policy. Although the New York Convention was a significant forward step in recognition and enforcement of an award rendered in international commercial arbitration the Contracting States, nevertheless, have been successful in maintaining their ultimate sovereign control over recognition and enforcement of foreign arbitral awards. Schwab, recognizing this power of a State, observes:

"--- [T]he power to enforce awards ultimately belong to the state that acting through the courts, the state must have authority to scrutinize at any time the lawfulness of an arbitration award. Law enforcement is no longer a private matter in any civilized community. It, acting through its agents, public authority is to enforce arbitration awards, public authority, must also be in a position to check on the foundations and limitations of arbitration."
The New York Convention, accordingly, allows a court to refuse recognition and enforcement of a foreign award on its own motion if the subject matter of the difference is not capable of settlement by arbitration under its law or enforcement is contrary to its public policy.

An appropriateness of the separate indication of these two grounds in clause (a) and (b) of article V (2) is doubted by a few commentators. A view has been expressed that these two grounds, in reality, represent two faces of the same coin as the non-arbitrability of a difference can always be raised within the scope of public policy defence\textsuperscript{130} and there will be a few cases where these two defenses do not overlap.\textsuperscript{131} It has also been argued that these two grounds, in fact, merge together into the exception of public policy\textsuperscript{132} and the ground of non-arbitrability, can therefore be deemed superfluous.\textsuperscript{133} During the New York Conference the necessity of non-arbitrability as a separate ground in paragraph (2) of article V was also doubted on the ground that it usually falls within the public policy exception.\textsuperscript{134} But the 1958 Convention, for historical reasons, distinguishes between these two grounds and accordingly provides for two ex-officio objections to the recognition and enforcement of a foreign award. P. Sanders, who participated in the deliberations of the New York Conference, aptly explains reasons for such a
separate mention of these two grounds in the 1958 Convention. He observes:

"The insertion of ground (a) next to ground (b) can only be explained for historical reasons: the 1927 Geneva Convention as well as the Draft Convention presented by the International Chambers of Commerce in 1955 treated this case separately".135

3.03.2.1 Non-arbitrability of the subject matter

Article V (2) (a) allows an enforcing court to refuse enforcement of an award on its own motion if the subject matter of difference is not capable of settlement by arbitration under its law. Non-arbitrability of a subject matter, which is guided by the national interest in judicial rather than arbitrable resolution and thereby falling in the substantive domain of the country,136 differs from country to country depending upon its "national respect" in the judicial settlement of the dispute.

Limitations on arbitrability of a subject matter reflecting national interests relate to the normal domestic relationship, involving local nationals or residents and a subject matter situated or registered locally. The issues to be probed into, in the context of transnational arbitration are: to what extent these national limitations are relevant when a dispute involves facts extending beyond the territory of one
State? and what is their impact on recognition or enforcement of foreign awards? These questions are significant in the context of article V (2) (a) allowing an enforcing court \textit{ex officio} to refuse recognition or enforcement of a foreign award if it finds that "the subject matter of the difference is not capable of settlement by arbitration under the law of that country."

The reported decisions under the New York Convention reveal that the question of non-arbitrable subject matter is refused in a relatively small number of cases and restrictive national laws are often applied in a more lenient way to international agreements than to purely domestic transactions. A number of enforcing courts since accession to the New York Convention in their quest to avoid 'hometown justice' have started giving precedence to 'international' or 'supernational' policy over 'national' policy in application of their domestic law for refusal of recognition or enforcement of a foreign award, on the ground of non-arbitrability of a subject matter.\textsuperscript{137} The leading case establishing such preference to 'international' policy in the matters of non-arbitrability is \textit{Scherk v. Alberto-Culver Co.}\textsuperscript{138} In this case the US Supreme Court held that although disputes arising out of securities transactions cannot be submitted to arbitration if the contract is domestic, disputes arising out of such transactions are
arbitrable if the contract is international. The Supreme Court refused to follow its earlier decision on the ground that the dispute under consideration arose from a "truly international agreement" involving significantly different considerations and policies from those confronted in the former decision. In order to ensure effectiveness of such agreements in transnational transactions the court felt obliged to ensure the arbitral clause even though such clause might not be enforced in domestic contracts. The court observed:

"A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jokeying by the parties to secure tactical litigation advantages. The dicey atmosphere of such a legal no-man’s land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." The Scherk case makes a clear distinction between arbitrability in domestic and international contexts and gives preference to the letter over the former. It also lends supports to the proposition that U.S.courts may enforce awards deciding claims that would be non-arbitrable if they arose in a purely domestic context.

Recently, the U.S.Supreme Court, in Mitsubishi Motors Corp. v. Solar Chryster-Plymouth Inc., stressing its belief in the efficacy of international
commercial arbitration both in general and resolving anti-trust claims, extended the Scherk principle to a Sherman Act anti-trust claim. It held that a Sherman Act anti-trust claim can be subjected to arbitration when the dispute arises in an international context. The background, in brief, was: Mitsubishi Motors Corporation a Japanese Corporation that manufactures automobiles, is the product of a joint venture between Chryster International, S.A. (CISA), a Swiss Corporation, and another Japanese Corporation, aimed at distributing through Solar Chryster (Solar) dealers outside the continental United States automobiles manufactured by Mitsubishi. Solar, a Puerto Rico Corporation, entered into distribution agreement contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. Thereafter, when attempts to work out disputes arising from slackening of the sale of new automobiles failed, Mitsubishi withheld shipment of automobiles to Solar, which disclaimed responsibility of them. Mitsubishi then brought an action in Federal District Court under the Federal Arbitration Act and the New York Convention, seeking an order to compel arbitration of the disputes in accordance with the arbitration clause. Solar filed an answer of counter claims, asserting, inter alia, causes of action under
the Sherman Act and other statutes. The District Court ordered Mitsubishi and Solar to arbitrate the issues raised in the complaint and counterclaims including federal anti-trust issues. The District Court following the Scherk dicta held that the international character of the Mitsubishi-Solar undertaking required in enforcement of the agreement to arbitrate even in anti-trust claims. However, the United States Court of Appeal for the first circuit, endorsing the doctrine of American Safety Equipment Corp. v. McQuire and Co. reversed the decision and concluded that neither the Scherk decision nor the New York Convention required abandonment of non-arbitrability of anti-trust claims in the fact of an international transaction. The U.S.Supreme Court reversed the Court of Appeals decision and held that the Solar's anti-trust claims are arbitrable pursuant to the Arbitration Act. The Court holding that the 'international character' of the dispute concerning the anti-trust claims make it arbitrable though it is generally non-arbitrable though in purely domestic disputes and reaffirming its conclusion in Scherk, observes:

"...[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of dispute require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."
The court, deposing its faith in arbitral disputes settlement in the field of international commerce and realising the need to 'shake off' the old judicial hostility to arbitration by the national courts, held that mere appearance of an anti-trust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tained. So too, the potential complexity of anti-trust matters does not suffice to ward off arbitration; nor does an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that anti-trust law imposes.146

The decision unequivocally discloses the U.S. courts assertion for expansion of the use of private arbitration as a means of dispute resolution even to anti-trust claims. It also unmistakably makes it clear that anti-trust claims based on international contracts are arbitrable though they are non-arbitrable in a purely domestic context. It also suggests and approves a narrow construction of an arbitration clause referring to an anti-trust claim arising out of a contract in international setting and the principle that intention of parties, generally, controls issues of arbitrability.147 The Mitsubishi, thus, promises to become another landmark decision in international commercial arbitration in the area of arbitrability of anti-trust claims in the international context. The
ruling has to be appreciated for its potential application to international anti-trust cases and for its far reaching positive consequences in the area of arbitrability of anti-trust disputes through international commercial arbitration and enforcement or recognition of foreign arbitral awards. It reveals and strengthens the attitude adopted by the U.S. courts crystallizing an emergence of an *ordre public internationale* in the field of non-arbitrability of a subject matter.

However, highest judicial forums of a few Contracting States have not resorted to the so-called 'international comity' and 'international character' while considering the question of non-arbitrability of anti-trust claims for the purpose of article V (2) (a) of the New York Convention. For example, the Belgian Supreme Court in *Audi NSU Auto Union A.G. v. S.A. Adelin Petit & Cie.* has held that the Belgian courts have no exclusive jurisdiction, notwithstanding any agreement to the contrary, to deal with disputes arising under the Unilateral Termination of Concessions for Exclusive Distributorship of an Indefinite Time Act of 1961, (limiting the unilateral termination of exclusive distributorship), and they are not arbitrable under the New York Convention. Accordingly, it justified its decision to refuse recognition and enforcement of an award made in Zurich under article V (2) (a) of the New
York Convention. Similarly, the Italian Supreme Court in *Compagnia Generale Construzioni v. Piersanti* has held that labour disputes are not arbitrable under the New York Convention.

It merits mention that a survey of reported decisions under the Convention reveals that the domestic non-arbitrable subject matter justifying refusal of recognition or enforcement of a foreign award under article V (2) (a) has, like other grounds, been narrowly construed by national courts, by giving precedence to 'international policy' over 'domestic policy'. However, disparity and variety in non-arbitrable matters in different countries represent a serious problem in recognition or enforcement of awards in transnational transactions. An arbitrator, when he makes an award, cannot be expected to anticipate laws of all the potential enforcement countries to avoid non-enforcement of the award. Inspite of the liberal view of the U.S. Courts and judicial extension to arbitrability of anti-trust claims it is sometimes difficult to draw a line of distinction between disputes strictly connected with imperative prohibitions reflecting the 'domestic' public policy issues and disputes which merely touch upon the so-called contractual rights in the 'international' context falling within the power of disposal of the parties. With a view to providing a solution to difficulties and divergencies concerning the extent of
arbitrability of a subject matter, Ion Nestor in his report on "problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters", submitted to the UNCITRAL, has suggested that all international trade disputes, subject to the rules of international public policy of each country, in principle, be made arbitrable and a generally accepted list of non-arbitrable questions be annexed to a possible new Conventions.\textsuperscript{151} Reacting to this proposal Van den Berg observes:

"--- [I]t will prove to be difficult to establish a list of non-arbitrable matters for each Contracting State. In many states it is unclear which matters are non-arbitrable and in those cases where they can be identified, it is difficult to lay down all the necessary kinds of subtle distinction for each case. Moreover, it will not be easy to reduce in writing all cases in which distinction between domestic and international public policy could be made. There is also a danger that states will be tempted to reverse the order by stating which matters are allowed to be arbitration upon, and to consider as arbitrable only the matters expressly mentioned in the list. This would vitiate instead of improving the existing situation. These observations would lead to the conclusion that the adoption of a generally acceptable list is both difficult to attain and undesirable because of the possible adverse effect."\textsuperscript{152}

He further feels that preparation of such a list does not warrant 'high priority' as in very few cases non-
arbitrability of subject matter had led to refusal of enforcement under the Convention.\textsuperscript{153}

The increasing acceptance of the distinction between the 'domestic' and 'international' public policy will certainly ameliorate the undesirable consequences resulting from the issue of arbitrability of the disputes. Another way could be to incorporate a broad definition of arbitrable disputes in the national laws encompassing arbitrability of all claims, contractual, commercial or financial. Obviously, it would depend upon the 'national interest in judicial and arbitral resolution of disputes'. However, such a welcome initiation finds place in the Swiss Statute on International Arbitration of 1987\textsuperscript{154}. It has incorporated a very broad definition of arbitrable disputes encompassing any claim related to a party's assets, rights or liabilities (nature patrimoniale).\textsuperscript{155} It, thus, avoids the difficulties that U.S. courts have encountered in determining whether anti-trust and
securities law issues are arbitrable or not. Similar legislative approach on the part of other states would undoubtedly bring uniformity in the issue of arbitrability and would also increase efficacy of the New York Convention.

3.03.2.2 Violation of public policy

In general, public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards as well as foreign judgments. The underlying principle is that no national court will give effect to a foreign award or judgment which obliges one party to contravene an imperative law of the forum. Accordingly, public policy exception can be found in almost every international convention or multilateral treaties relating to commercial arbitration. The doctrine of public policy provides 'a kind of barrier blocking the passage of the foreign law' and the national court judges are responsible for manning the barrier and determining its (foreign law) entry in their country. It's function is basically to be a guardian of the 'fundamental moral convictions or policies of the forum'. Recognition and application of a foreign law or foreign judgment is therefore refused when it is inconsistent with the fundamental public policy or outrages (the) sense of justice and decency or 'shocks the social or legal concepts of the forum'.156
The concept of ‘Public Policy’, which reflects the fundamental economic, legal, moral, political, and social standards of a State, naturally, differs according to its character and structure to which it appertains and covers those principles and standards which are so sacrosanct as to require (their) maintenance at all costs and without exception. However, uncertainty in the contents and degree of the fundamentality of the so-called ‘sacrosanct’ moral convictions or policies of the forum, which is supposed to be one of the essential characteristics of public policy, makes it difficult to define the ‘fundamentality’ of the constantly changing doctrine and to enumerate its contents a priori. A national court may apply its own public policy or some accepted international public policy when it’s effects cross the domestic borders. The domestic public policy is, thus, relevant to international commercial arbitration. It plays a double role in transnational commercial arbitration as its violation may not only be invoked in the country where an award is made but also in the country of (its) enforcement.

The New York Convention, like the 1927 Geneva Convention, provides for refusal of recognition and enforcement of a foreign award if such recognition or enforcement “would be contrary to the public policy of that country.” The ‘public policy’ defense, unlike
that of article V (1), is 'broader' and is a 'catch all' provision encompassing all possible general objections national courts might choose to resist enforcement of an award.\textsuperscript{159} The scope of the public policy objection is uncertain\textsuperscript{160} as it includes those matters regarded by the legislators or the courts as clearly of 'fundamental' concern to the State and the society. Legislative history of the New York Convention offers little guidance on the scope of this provision. The five equally authentic texts of the Convention, in fact, presented difficulty in interpretation of the phrase 'public policy'.\textsuperscript{161} The term 'ordre public' used in the French text is said to be more equivalent to the English concept of law and order than to the meaning given by English courts to the term public policy.\textsuperscript{162} In fact, the term 'public policy' or 'ordre public', it has been observed, has distinctively different meanings in anglo-American, Latin and German speaking countries.\textsuperscript{163}

Though the scope of the public policy is indefinite and uncertain a distinction between domestic public policy or ordre public interne and international public policy or ordre public international or ordre public extrene is well established in the jurisprudence of Continental courts. The distinction between domestic and international public policy, in effect, means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to
public policy in international relations. The first notion refers to the violation of domestic fundamental conceptions of the legal order while latter refers to the violation of really fundamental conceptions of the legal order as understood at the international level. Such distinction enables the courts to apply different standards of public policy to the purely domestic cases and the cases involving 'foreign element' or 'transnational effects' and to adopt a somewhat liberal approach in the international context of the cases involving the conflict of laws.

Against this background one has to answer two questions: What does the phrase contrary to public policy means as a ground for refusal of recognition and enforcement of a foreign award under article V (2) (b) of the New York Convention? and does it incorporate the generally accepted distinction between ordre public interne and ordre public international in the field of recognition and enforcement of foreign awards? These questions are significant due to the fact that the nature and scope of the doctrine of public policy, which is said to be ambiguous and too broad to include virtually any probable reason to refuse recognition and enforcement of an award, determines the judicial approach in sua sponte refusal of enforcement of an award in the enforcing country. It is needless to mention that there is direct co-relation between
judicial precision in delineation of the scope of the public policy exemption and its usefulness in international commercial arbitration. If it is interpreted widely it is natural that a resisting party, after realising that none of the specific objections for refusal set forth in article V (1) exists, will be tempted to oppose its recognition and enforcement on the ground of violation of forums public policy. Such judicial approach certainly weakens international commercial arbitration as a method of dispute settlement. And if it, on the other hand, is interpreted narrowly, giving effect to the above mentioned distinction between domestic and international public policy, its use as a ground for refusal of enforcement in international commercial arbitration would obviously be restricted.

However, travaux, préparatoires and deliberations at the New York Conference finalising the 1958 Convention offer little guidance on the scope of the public policy exception and intention of the drafters of the Convention as to the definition, nature and scope of the term 'contrary to public policy' vis-à-vis recognition and enforcement of foreign awards. However, considering the manner in which the public policy defense figured for the first time as a formal rule governing international commercial arbitration in the 1927 Geneva Convention has undergone modifications
before its final incorporation in the 1958 Convention, and remarks of the Chairman of the Working Party No.3 that "the provision allowing refusal of enforcement on grounds of public policy should not be given a broad scope of interpretation", a few commentators assume that the drafters of the Convention intended to limit the scope of the public policy exception to 'ordre public international' rather than to the 'ordre public interne'.

The United States Court of Appeals for the Second Circuit, when first called on to interpret the public policy defence in the case of *Parsone & Whittemore*, admitting that the legislative history of article V (2) (b) offers no certain guidelines to its construction and examining the defence in the historical context of the Convention as a whole, observed:

"--- [T]he Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."

The court, noting the 'pro-enforcement bias' of the Convention felt that a broad interpretation of the public policy defence would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement and it would encourage foreign courts to readily accept their own public policy defences. It was
argued by the Parsons that it would be contrary to public policy of the U.S. to enforce an award holding it (Parsons) liable for arbitral damages, "as a loyal American citizen" it had abandoned the agreed construction project in Egypt pursuant to the U.S. policy as manifested by the United States Agency for International Development's (AID), withdrawal of financial support when the six-day Arab-Israeli war was about to break out. Responding to this argument the Court distinguished between a forum's "public policy" and its "national policy" and refused to equate the latter with the former. Relying on the above mentioned narrow constructionist view it observed:

"In equating "national" policy with United States "public" policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy". Rather a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. To deny enforcement of (this) award largely because of the United States' falling out with Egypt in recent years would mean converting a defence intended to be of narrow scope into a major loophole in the Convention mechanism for enforcement".169
The same court a year later in *Copal Co. Ltd. v. Fotochrome Inc.*[^170] not only reiterated its view that the public policy limitation of the Convention is to be construed *narrowly* and to be applied *only* where the enforcement would violate the forum state’s most *basic notions of morality and justice.* It is worth noting that the US Supreme Court has recently not only affirmed the narrow construction given to the phrase ‘public policy’ defence in the *Parsons* decision and asserted that the *Parsons* holding is itself a statement of public policy, but also enforced a foreign award though it was contrary to the public policy of its country of origin (Saudi Arabia) on the ground that such enforcement does not violate ‘a well defined and dominant international public policy’ of the US Department of Defense.[^171]

Recently, the Court of Appeal, Civil Division, U.K., rejected a contention that it would be contrary to public policy of England to enforce an award made in Geneva under the ICC Rules determining the substantive obligations of the parties not on the basis of any particular national system of law but on some unspecified and ill-defined ‘internationally accepted principles of law’. The decision makes an advancement over the prevailing dicta to the effect that it is the policy of the law in England that arbitrators must, in general, apply a fixed and recognizable system of law.

[^170]: 361
even though that law may be the law of the foreign country. The court cautioned that though the considerations of public policy cannot be extensively defined they should be approached with extreme caution. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the coercive powers of the State are exercised.\textsuperscript{172}

In fact, a majority of courts of the different Contracting States,\textsuperscript{173} like the US courts, adhering to the underlying `pro-enforcement' policy of the Convention, have offered a narrow construction to the public policy exemption by making a distinction, expressly or implicitly, between the so-called domestic and international public policy. Accordingly, not every infringement of provisions of domestic law\textsuperscript{174} or basic notions of procedural due process\textsuperscript{175} of violation of the principles of natural justice such as fraud on the part of the respondent, lack of proper notice, improper summoning of a party,\textsuperscript{176} award without reasons\textsuperscript{177} etc., has been treated as `violation of the forum states' most basic notions or morality and justice', though they play a significant role in domestic or national public policy of the concerned state. The enforcing
courts are generally inclined to follow the narrow construction of the public policy defence and are willing to refuse recognition or enforcement of a foreign award in very extreme cases on the ground of violation of their public policy.178

However, the welcome distinction between ordre public interne and ordre public international appreciated and applied by a majority of courts got set back from the Supreme Court of Austria and the Delhi High Court (India), which feel that article V (2) (b) of the New York Convention does not contemplate such distinction between domestic and international public policy. The Austrian Supreme Court179 refused to enforce a Dutch award on the ground that such enforcement violates its public policy. It not only refused to accept the well-established distinction between the domestic and international public policy and narrow interpretation of the anti-enforcement grounds but also argued that the exemption of public policy used in article V (2) (b) of the Convention does not contemplate such a distinction. The Delhi High Court, India, following similar argument, also refused to enforce an award for damages rendered in London by the ICC in favour of COSID Inc., an American company, against the Steel Authority of India (SAIL), a government company, for its failure to supply the agreed quantity of Hot Rolled Steel Coils to COSID because of the Government’s
ban on export of such coils. It accepted contention of the SAIL that enforcement of the award would violate the public policy of India as under its Articles of Association, it was bound by the Governments directives/orders banning export of such coils. When the Delhi High Court's attention was drawn to the cases examined by Van den Berg and his considered observation that the distinction between domestic and international public policy is gaining increasing acceptance in matters of arbitration as well and what is considered public policy in domestic relations does not necessarily pertain to public policy in international relations considering the legislative history of article V (2) (b) of the Convention, it observed:

"The provisions of S.7 (1) (b) (ii) of the Act do not make any such distinction and to interpret this plain provision of law, I need not go into the legislative history of article V (2) (b) as stated by the learned author in his book, 'the New York Arbitration Convention of 1958'. As to whether the enforcement of the award would be contrary to public policy of the country, I have not to see whether it is domestic public policy or international public policy and whether international public policy should override domestic policy. Use of expression public policy in section 7 (1) (b) (ii) of the Act would mean public policy of the country i.e. India. Article V (2) (b) of the Convention is also to the same effect." 183

It is respectfully submitted that against the background of the objectives of the New York Convention;
its 'pro-enforcement bias'; generally accepted narrow construction of defences rule; well settled distinction between **ordre public interne** and **ordre public internationale** and its 'increasing acceptance' in arbitration law to bridle the unruly horse of public policy or to delimit its 'variable quality' or 'uncertainty', the arguments of the Austrian Supreme Court and the Delhi High Court doubting the distinction between domestic and international public policy and refusing to read it under public policy exemption in their respective statutes implementing the New York Convention do not seem sound, persuasive, convincing and are without authority. Such a 'deviational attitude' from generally accepted distinction between domestic and international public policy would certainly hamper smooth flow of international trade and also would tempt the enforcing courts to discover new heads of public policy to deny recognition and enforcement of a foreign award. In fact, the Supreme Court of India which has advised courts in India not to make any attempt to discover new heads, has underlined the necessity of construing the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, implementing the New York Convention, in a liberal manner. It observed:

"It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international
trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its liberal and grammatical sense, a liberal construction.” 184

Though it is difficult to determine what exactly is the content of the so-called ‘ordre public international’ the distinction between domestic and international public policy is gaining increasing acceptance in international commercial arbitration. 185 There is, of course, no method by which its adherence can be regulated or enforced. It has to be crystalised through voluntary uniform interpretation of the public policy defence sticking to the forum’s most basic minimum standards of ‘fundamental notions of justice and morality’. Failure to adhere to the internationally recognised minimum standards and acceptance of the widely followed distinction between ordre public interne and ordre public extrene in arbitration may result in an obstacle in international commerce and thereby frustrate the effectiveness of the New York Convention. Court decisions of the different Contracting States, barring a few, as mentioned earlier, involving application of public policy make it clear that national courts interpret their public policy in the narrowest fashion where an international arbitration is involved. Enforcement of an award is refused only where giving effect to it violates a manifest and definite principle
of "international public policy or *ordre public externe*" of the forum. Such approach is conducive to the desired effectiveness of the Convention as international public policy, unlike the *ordre public interne*, is not influenced by the domestic standards of public policy but rather reflects the fundamental standards of the international community, carrying both trading standards of national policies as well as fundamental concepts which have been embodied in international conventions or other international instruments. It would also help to develop general principles of international law in the field of transnational trade and commerce.

IV Conclusion

The New York Convention, whose principle purpose is "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the Contracting States", *inter alia*, lays down the conditions to be fulfilled by party seeking enforcement of a foreign award and enumerates restrictive and exclusive grounds for refusal of its recognition and enforcement for smooth and speedy enforcement of arbitral awards rendered in transnational commercial arbitral settlement. However, it, exhibits a few significant practical impediments and inherent weaknesses affecting its proclaimed objective of smooth and uniform recognition and enforcement of foreign
arbitral awards in the Contracting States. The prominent among them are discussed below.

4.01 Problem of application

The New York Convention endeavours to recognise and enforce in all the Contracting States foreign arbitral awards and non-domestic awards rendered in other Contracting States. But either the Convention or national Acts implementing the Convention neither offer much guidance in interpreting the phrase `foreign arbitral award` nor provide clues as to which awards will be considered `domestic award` for the enforcement purposes. No restriction is introduced in the text of the Convention as to the `domestic` or `international` character of the dispute brought to arbitration, either from the point of view of the subject matter of the difference or of nationality, residence or domicile of the parties involved. Purely domestic disputes can, therefore, be referred to foreign arbitration and lead to awards recognisable and enforceable under the Convention. Further, the foreign character of an arbitral award with respect to the state where recognition and enforcement is sought does not therefore imply the existence of any non-domestic issue in the arbitration. It may be questioned that whether an award qualifies for recognition and enforcement under the Convention whenever it is done in the territory of
a foreign State, or is considered as 'non-domestic' by the law of the requested State, or whether the term 'foreign' must be understood as implying a special connection with a foreign municipal law. Although the New York Convention presupposes that arbitration agreements and the consequent awards are governed by a national law it does not impose a duty upon the Contracting States to treat those agreements and awards detached from the ambit of a national arbitration law by means of an agreement of the parties. Such arbitrations are not subjected either to the procedural rules and conflict of laws rules of any particular country or to the substantive rules of any particular legal system. It is solely governed by the rules chosen by the parties and general principles of law or lex mercatoria. It is submitted that a stateless award, which excludes application of a national arbitration law and supervision or interference of the national courts, should be everywhere treated as foreign award under the Convention. Fortunately, the Model Law prepared in 1985 by the UNCITRAL gives prime importance to the arbitration based on autonomy of the parties. But its impact is yet to be seen with regard to the concept of international award and its status in the contemporary arbitral settlement of transnational commercial disputes.
4.02 Problem of reservations

Further, though the Convention's motto is to bring uniformity in recognition and enforcement of foreign arbitral awards in the Contracting States, it gives a way to a certain degree of latitude to national laws. Article I (3) allows the Contracting States to restrict the application of the Convention to awards made in a Contracting State and to differences which are considered 'commercial' under the lex fori of the enforcing State. The first reservation, generally called a reciprocity reservation, however, makes marginal impact on the applicability of the Convention as more and more States are becoming parties to it and it allows parties to determine situs of the arbitration proceedings and the resulting award. The second reservation, commonly known as 'commercial reservation', has not only surrendered the Convention to national laws but also, to some extent, diluted efficacy of the Convention as an international instrument in the field of recognition and enforcement of arbitral awards rendered in international trade.

4.03 Problem relating to the grounds for refusal of enforcement

The Convention, as stated earlier, gives binding effect to an award and enumerates restrictive and exclusive grounds to object its enforcement. It also
puts the burden of proof on the reluctant party opposing
the enforcement to prove existence of the alleged
grounds to avoid recognition and enforcement of the
award. Article V of the Convention categorises these
grounds into the grounds to be proved by the party
opposing recognition and enforcement of an award and the
grounds on which an enforcing court can suo moto deny
recognition or enforcement of a foreign award. These
grounds, almost in verbatim, appear in all the national
laws of the Contracting States implementing the New York
Convention. Almost all the enforcing courts have
endorsed the ‘pro-enforcement bias’ of the Convention
and accordingly have resorted to narrow construction of
the grounds to make the refusal difficult and to boost
recognition and enforcement of foreign arbitral awards.
However, as attempted in the preceding pages, there
exists an element of uncertainty and ambiguity in
interpretation of a few grounds. Prominent among them
are highlighted hereunder:

4.03.1 Improper composition or irregularity in procedure

An ununiform judicial approach to refusal of
recognition or enforcement of an award on the ground of
procedural irregularity in the arbitral proceedings
leaves a doubt as to the extent of parties autonomy in
selecting rules of procedure and the role of lex loci
arbitrii in determining arbitral procedural irregularity
and raises a set of pertinent questions, namely, does it really allow/prohibit delocalisation or denationalisation of international commercial arbitration?; does autonomy of parties empower the parties to opt for any procedural law? and what is the role and relevance of the lex loci arbitrii in the matter of arbitral procedure? These questions are not clearly demonstrated in the Convention. Equally forceful arguments and speculations for either side can be made. However, recent developments in national arbitration laws vis-a-vis international commercial arbitration show a remarkable tilt in favour of the party autonomy in shaping of the arbitral process.

4.03.2 Determination of the binding character of an award

Though the term ‘binding’ in article V (1) (e) has not been equated with the term ‘final’ used in the Geneva Convention, it has been forcefully contended at times that ‘binding’ should be construed to mean that no remedies at all exist against the award under the law of the country where, or under the law of which, it was made. National courts have made a distinction between ‘ordinary’ and ‘extraordinary’ means of recourse against an award and have favoured the former for determination of its binding character. They generally, have agreed that article V (1) (e) eliminates the so-called ‘double exequatur’ from the New York Convention. However, these
courts differed as to the 'moment' when an award is to be considered as having become binding. An interpretation independent of municipal law, as attempted in the preceding pages, for determination of such a 'moment' can be made. Such autonomous interpretation will preclude a review of an award on merits by a court or a second arbitral tribunal. Similarly, absence of grounds for setting aside an award in the 1958 Convention not only surrendered the Convention to the diverse national laws but also allowed indirect inclusion in the Convention of the grounds of setting aside of an award in domestic arbitration law. Such unwarranted extension has hampered uniform interpretation of the convention and has also diluted efficacy of the limitative character of the grounds for recognition and enforcement of a Convention award.

4.03.3 **Non-arbitrability of a subject matter and violation of public policy**

The grounds mentioned in article V (2) justifying *suo moto* refusal of recognition and enforcement of a foreign award by an enforcing court on unspecified and uncertain grounds of non-arbitrability of subject matter of the difference and violation of public policy or *ordre public* according to its *lex fori* as mentioned earlier, have created a few noticeable problems in the
area of recognition and enforcement of foreign awards. These grounds have not only generally widened the discretion of the enforcing courts in denying enforcement of awards but also possibly have gone against the desirability of uniform standards in the matter of enforcement. However, courts have shown their inclination to follow a more liberal approach by making a distinction between "ordre public interne" and "ordre public externe" when these issues arose in the international context. Such distinction, barring a few instances, is more conspicuous and gaining increasing acceptance in the area of public policy than non-arbitrability of the subject matter of the difference. The principle that the grounds enumerated in article V of the Convention, in the light of the overall fundamental scheme of the Convention and its pro-enforcement bias approach, be construed narrowly is also making inroads in interpretation of these two grounds. The prevailing judicial approach if continued would give a remarkable momentum to achievement of uniformity in the recognition and enforcement of foreign arbitral awards.

4.04 Unification and Standardisation =

A Workable Solution

It is needless to mention that to promote the wider use and increase the effectiveness of international commercial arbitration, it is desirable
to take appropriate steps to expedite the harmonization and unification of the law relating to international commercial arbitration and to avoid divergencies and uncertainties in the existing international instruments. If the 1958 Convention is to have wider and effective application than it has at present and if some immediate uniformity is to be attained in it to make it a real international instrument in the area of recognition and enforcement of foreign awards, it would be desirable to clarify the above mentioned problems which operate as obstacles to the uniform interpretation and application of the Convention. A few prominent among them are:

(a) The classes of awards to which the Convention should apply;

(b) The scope of the reciprocity and commercial reservations provided in article 1 (3);

(c) Autonomy of parties in determination of the "arbitral procedure", and role of the *lex loci arbitrii* in arbitral procedure;

(d) "Binding" character of an award; and

(e) At least, some indication as to what would be included within the expressions of "non-arbitrability" of a subject matter and "public policy".

These problems, among others, could, in the light of the above made suggestions and judicial pronouncements, be clarified either by way of a protocol or by establishing
uniform standards in unclear aspects of the recognition and enforcement of foreign awards.

The Asian-African Legal Consultative Committee (AALCC) in its Seventeenth Session (1976) has also identified certain difficulties with the 1958 New York Convention leading to uncertainties in a few aspects and divergent results in its interpretation and application. It, commenting on the relationship between arbitration rules chosen by the parties and municipal laws of the Contracting States, rightly felt that the selected arbitration rules may be in conflict with the municipal law either of the place of arbitration or of the place where execution of an award may be sought. In such cases the parties would be deprived of the right to conduct their arbitration in conformity with the agreed rules. It strongly felt that certain measures should be taken to ensure that an arbitration in pursuance of the arbitration rules selected by the parties and to recognise and enforce such awards in all the Contracting States. It also felt that the refusal of the recognition and enforcement of award on the ground of violation of public policy of the forum operates as an obstacle to the uniform interpretation and application of Convention and urged for its clarification within the framework of the Convention.\textsuperscript{189} It accordingly invited the United Nations Commission on International Trade Law (UNCITRAL) to consider the possibility of preparing a
protocol to be annexed to the 1958 Convention with a view to clarifying, *inter alia* the following issues: 190 (a) where the parties have themselves chosen the arbitration rules for settling their disputes the arbitration proceedings should be concluded pursuant to those rules notwithstanding any contrary provisions in municipal laws applicable to the arbitral procedure and the award rendered should be recognised and enforced by all the Contracting States to the 1958 New York Convention; (b) where an arbitral award has been rendered under procedure which operate unfairly against a party, recognition and enforcement may be refused.

The UNCITRAL, in its tenth session (1977), considered these recommendations and requested its Secretary General to prepare a study on these matters in consultation with the AALCC and other interested organisations. The Secretariat, in consultation with the AALCC, ICCA and ICA, made a report on the application and interpretation of the 1958 Convention. 191 It concluded that the problems identified by the AALCC are not of such a magnitude to justify a protocol to the Convention and accordingly disapproved the idea of the protocol as an inappropriate approach. It instead suggested a possible way of uniform rules taking into account the specific features of international arbitration to reduce
the difficulties and divergencies in interpretation and application of the 1958 Convention due to disparity in national laws.\textsuperscript{192} Deliberations on these recommendations and suggestions ultimately culminated in the adoption of the Model Law on International Commercial Arbitration by the UNCITRAL in 1985.\textsuperscript{193}

The Model Law provides a model arbitration law free from unnecessary and complicated national procedural laws: operation in the international commercial arbitration for its adoption by the national legislatures. It incorporates identical provisions to that of the 1958 New York Convention in the matters of recognition and enforcement of foreign arbitral awards and their refusal.\textsuperscript{194} Obviously, divergent views were expressed as to propriety of such identical provisions in the existence of widely adhered New York Convention. It was opined that provisions on recognition and enforcement of foreign awards were not needed by those states which adhered to the 1958 Convention, and a State which has decided not to adhere to the Convention would be unwilling to adopt the almost identical provisions of the Model Law. Such provisions might cast doubt in the effect of the reciprocity reservation made by many member states and might create other difficulties in the application of the Convention. On the other hand, it was pointed out that the existence and generally satisfactory operation of the New York
Convention, to which many states adhered, was no compelling reason for deleting from the Model Law the draft chapter on recognition and enforcement. A view was expressed that some of the states might, for constitutional or other reasons, find it easier to adopt the Model Law provisions on recognition and enforcement than to ratify or accede to the Convention. Further it was stated that Model Law would be incomplete if it lacked provisions on such important subject as recognition and enforcement of awards. As regards the states, that are parties to the 1958 Convention, the draft chapter might provide supplementary assistance by providing regime for non-Convention awards, without adversely affecting the operation of that Convention. It was also hoped that the concept of uniform treatment of all awards irrespective of the country of origin would be beneficial for the smooth functioning of international commercial arbitration. The UNCITRAL, however, after due deliberations, decided to retain in the Model Law the provisions dealing with recognition and enforcement of awards and to invite the General Assembly to recommend to States to consider them when they enact or revise their laws to meet the current needs of international commercial arbitration. It seems that the identical approach was prompted with an idea to supplement the legal network for recognition and enforcement of arbitral awards widely accepted in the 1958 New York Convention.
The Model Law not only mandates every state to recognise any arbitral award as binding but also provides for recognition and enforcement of all awards emanating from international commercial arbitration irrespective of their country of origin. It, accordingly, makes a distinction between 'international' and 'non-international' awards instead of the present demarcation between 'foreign' and 'domestic' awards. A proposal, following the example of the 1958 Convention, for the condition of reciprocity on the Model Law was made. But it was rejected on the ground of practical difficulty in agreeing on a specific kind of reciprocity and its undesirability in unified approach by way of 'non-international' awards instead of the present demarcation between 'foreign' and 'domestic' awards. A proposal, following the example of the 1958 Convention, for the condition of reciprocity on the Model Law was made. But it was rejected on the ground of practical difficulty in agreeing on a specific kind of reciprocity and its undesirability in unified approach by way of Model Law. It, therefore, was thought proper to leave it to the national laws adopting the Model Law. It, subject to its provisions, recognises parties autonomy in determination of the arbitral procedure. In its absence, the arbitral tribunal may establish its own 'appropriate' procedure ensuring 'equal' treatment to the parties and allowing every party a 'full
opportunity of presenting his case. Such a wide degree of party autonomy allows the parties to tailor the arbitral procedure to their specific needs. And in the absence of such choice, it allows the tribunal to establish flexible framework to operate under enabling them to accommodate a great variety of international cases without being unduly constrained by the peculiarities of local laws. The Model Law also reveals an important improvement over the 1958 Convention by incorporating a provision dealing with the setting aside of an award as an exclusive type of recourse against an arbitral award. It, unlike the 1958 Convention allows active attack only on the grounds listed in it to the exclusion of any other means of recourse available in any another procedural law of the state in question for setting aside of the award. It is again interesting to note that the grounds allowing setting aside of an award under the Model Law are almost identical to that of the grounds listed for refusal of recognition and enforcement of arbitral awards in the 1958 Convention. However, two practical differences resulting from the respective provisions should not be overlooked. The grounds for refusal of recognition and enforcement are valid and effective only in the state(s) where the winning party seeks recognition and enforcement, while successful plea of the grounds for setting aside at a place of origin
precludes enforcement of that award in all other countries and thus kills the award at the root. It is for these different purposes and effects of setting aside and of invoking grounds for refusal of recognition and enforcement that the Model Law maintains the alternative (or double) system of defences which grant any party freedom to decide on how to raise his objections against the award. The value of the suggested list of the grounds enabling setting aside of an award in the Model Law also becomes clear if one recalls a variety of unidentical, extensive and time consuming means of recourse against arbitral awards prevailing in different national laws on arbitration and absence of such specifications of such grounds in the New York Convention though it allows refusal of recognition and enforcement of a foreign arbitral award which has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. The 1958 Convention provision, obviously, has been subjected to different interpretations leading to uncertainty. The Model Law rightly attempts to ameliorate these state of affairs by enumerating a fairly short list of exclusive grounds on which an award may be set aside. The provisions of the Model Law pertaining to recognition and enforcement of award, indeed, go a step further in the direction of recognition and enforcement of 'international award', the concept introduced and pressed for in the ECOSOC
draft, rather than a foreign award only. The provisions are exempted from the strict territorial orientation so that all arbitral awards are to be recognised by the courts of states adopting the Model Law as binding and enforceable, regardless of whether the state in which they are made has adopted the Model Law. The Model Law further strengthens this approach of greater international force by exhaustively listing the grounds for setting of an award and refusal of recognition and enforcement of an award.

The Model Law intends to ensure uniformity in international arbitral procedure and to minimise conflicts between national laws *via-a-vis* transnational arbitration. It also endeavours to facilitate the international enforcement of arbitral awards by diluting certain practical problems crept in the 1958 Convention and thereby it intends to provide uniformity to the application of the 1958 Convention. Model Law is, thus, intended to the *lex specialis* i.e. special regime of law prevailing over any contradictory domestic law that deals with the same subject. It, as *lex specialis* supersedes conflicting provisions of domestic laws leaving them (national laws) in full force on the matters not covered by it (Model Law). It attempts to contain within it the whole of the arbitration law of the countries which adopt it as a model. It is important to emphasise here that the Model Law can not
be modified by the parties beyond the limits permitted by itself and the model Law becomes applicable and operative only when a state's national system adopts it as a law governing arbitration. A positive approach of it will certainly result in far reaching contribution in international commercial arbitration. A country, at the time of its adoption must resist the temptation of a purely national approach.

Approach of the states to Model Law is yet to be seen, it is hoped that it would be accepted by a majority of states. In fact, during this short span of time a few states have revised their arbitration laws modeled on the UNCITRAL Model Law. The efficacy and fairness of international arbitration depend on how national legal systems deal with arbitral agreements, proceedings and awards. The UNCITRAL Model Law if adopted by the national systems would bring uniformity in the recognition and enforcement of awards rendered in international commercial arbitration. But till national laws incorporate these trends domestic courts will have to ensure effective and smooth recognition and enforcement of foreign arbitral awards by relying heavily upon the spirit of these emergency trends.

334
Footnotes


2. For details see Riccardo Luzzatto, 'International Commercial Arbitration and the Municipal Law of States', Recueil des cours, de l'Aca


4. 92 LNTS, 301 (1928). For text, see ISIL, ibid. pp. 19-22.


6. Art. 1.

7. Art. 3.


9. Supra n.4.

10. Art. 1.

11. Art. 1 (a) to (e).

12. Art. 2(a) to (e).


15. Article 2 and Art. 1 (c) of the Protocol and Convention respectively.


21. U.N.Doc.E/C, 2/373, Add. 1, p. 3 & 7. However, the idea of an international award was then unacceptable to the majority of the States, though it has proved to be in more modern times when the Model Law (1985) was being formulated.


23. Austria, Belgium, Ecuador, Egypt, India, Sweden, U.K. and the U.S.S.R.


26. Art. II.

27. Art. III.


30. A State may, however, limit applicability of the convention to awards made in other Contracting States only vide Art. 1 (3).


32. Art. III.

33. Art. V (1) (e).

34. Art. V (1) (a) to (e).

35. Art. V of the 1958 Convention in its opening sentence uses the word "may" while the corresponding Art. 1 of the 1927 Convention used the word "shall".

36. United Nations, apart from its work at international level through the ECOSOC which ultimately culminated in the adoption of the 1958 New York Convention, consistently endeavoured to expand commercial arbitration at regional level through its four regional economic commissions: viz., ECE, ECAFE, ECLA & ECA; the activities of the ECE had been primarily in the field of international contracts and commercial arbitration, See A/6396 pr. 66 (1966). For details see document A/CN, 9/64.

37. 484 UNTS 364 (1963-64). No. 7041. It has been adhered to by Austria, Belgium, Bulgaria, Byelorussien SSR, Cuba, Czechoslovakia, Denmark, France, FRG, German D.R. Hungary, Italy, Poland, Romania, Spain, Ukrainian SSR, USSR, Upper Volta and Yugoslavia. Except for Upper Volta and Yugoslavia all states are also parties to the New York Convention.

38. Art. X (1) and (2) allow an accession of the Convention by non-European countries.

39. For details see Article V (1) (e), infra.

40. For an excellent analysis pertaining to the nature of relationship between the European Convention and the New York Convention, see Van den Berg, The New


42. Art. IV (1).

43. Art. IV (2).

44. Art. V (1).


46. It was signed by Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay and Venezuela.

47. The American hemisphere believed that it was not appropriate to participate in either the 1958 New York Convention nor the 1961 European Convention to preserve an inter-American Commercial Arbitration system (vide A/CN.9/64, p. 213 (1972).

48. Art. 4.

49. Art. 5 (2).


51. It is a much debated question whether international arbitration and awards may be "stateless" or whether they must always be governed by a national


53. It may be noted that the Convention does not include in its requirements any further connecting factors, such as nationality, domicile, residence, or place of business, to be fulfilled by the parties for recognition and enforcement of an award. It also preclude the contracting states from stipulating such conditions into implementing legislations (see article 1).

54. Out of the 73 States adhered to the New York Convention by the end of April, 1987 forty-seven and twenty-seven have respectively taken the advantage of the reciprocity and commercial reservation.

55. It is difficult to find the exact meaning of the phrase matters "considered as commercial under the national law" for example, see, Indian Organic Chemical Ltd. v. Chemtex Fibres Inc., A.I.R. 1978 Bom. 106; Orient Middle East Lines Ltd. v. Brace Transport Corp. of Monrovia, A.I.R. 1986, Guj. 62; Joseph Melaher GMIR & Co. v. Kanoria Chemicals & Industries Ltd., A.I.R. 1986 Cal. 45; Microporri SPA
56. The convention makes a clear distinction between the conditions required for enforcement of a convention award and procedure for such enforcement. The former is governed by the Convention alone while the latter is determined by the procedural law of the forum.

57. For details see, Van den Berg, supra n.40 p. 237 et seq.

58. Article III, Second para.

59. Article IV. For a set of interesting questions see, Van den Berg supra n.40 p. 250 et seq.

60. This approach is significant in the light of the mandatory words used in article IV. However, the Italian Supreme Court refused to enforce an award on the ground that the petitioner has not supplied the arbitration agreement along with application for its enforcement. For details, see Van den Berg, supra n.40 pp. 248-50.


63. For details, see Lawrence Collins, Dicey and Morris on Conflict of Laws, (Stevens, 11th ed., 1987); vol. II p. 1161; North & Fawcett, Cheshire & North’s, Private International Law, (Buttsworths, 11th ed. 1987), p. 480 et seq.

64. Van den Berg, supra n. 40 p. 277.


Also see, 4 YCA 231 (1979); Van den Berg, supra n. 40 p. 287 et seq.


68. However, the Italian Supreme Court in Lanificio Waller Benci s.a.s. v. Bobbie Brooks Inc. [reported in 6 Y.C.A. 233 (1981)] took the position that validity of the arbitration agreement, including its formal validity, should be determined according to the conflict rule in article V (1) (a) and not by article II (2) of the Convention. It argued that article V operates at the level of enforcement of the arbitral awards regulated by article III-V of the convention while article II, which operates at the stage of the enforcement of the arbitral award, is inapplicable. Van den Berg convincingly argues that the view of the Italian Supreme Court is at odds with both the legislative history of the Convention and its internal consistency. (see Van den Berg, supra n.40 p. 285 et seq). However, the Italian Supreme Court in subsequent cases changed its stand and applied article II (2) in the proceeding concerning the enforcement of foreign arbitral awards, see 7 YCA 342 (1982); 10 Y.C.A. (1984).


72. Van den Berg, supra n.40 p. 298.

73. Gaja, supra n. 25 I.C. 4.


75. A few leading examples are: Carters (merchants) Ltd. v. Francesco Ferraro, 4 Y.C.A. 275 (1979); Renault Jacquet v. Siceq 4 Y.C.A. 284 (1979); Biotronik Messund Therapiegerate GmbH & Co. v. Medford Medical Instrument Co., 2 Y.C.A. 250 (1977). The opinion is also shared by a number of authors, for example Quigley, supra n.25 p. 821; D.R.Thomas, supra n. 65.
76. See 'Court Decisions on the New York Convention 1958' reported in the successive YCA.

77. See Van den Berg, supra n.40 pp. 301-302.

78. Van den Berg ibid, p. 300.

79. See Van den Berg supra n.40 p. 298 et seq.


81. Compare article V(1)(d) of the New York Convention with Art. 1 (c) r.w.art. 2 (1) of the Geneva Convention.

82. For discussion of competing views see Gaja, supra n. 25 I.C.3. Also see Van den Berg, supra n.40 pp. 34-37.

83. Private International Law Committee, The Fifth Report (Recognition and Enforcement of Foreign Arbitral Awards) Gymn 1515 p. 31 (hereinafter referred to as PII Committee Report). Also see, Quigley, supra n. 25 pp. 1068-69.

84. Rene David, supra n.1 p. 399; Patchett, supra n.3 p. 303; J.Steward McCleandon, Enforcement of Foreign Arbitral Awards in the United States, 4 Northwestern Jr. of Int'l L. & Bus. at pp. 65-66; P. Sanders, supra n.66 at 274. The Secretary General UNICTRAL in its report, also concludes that the reported cases indicate that the priority accorded to the parties autonomy is limited only by the public policy ground; see, A/CN.9/168/pr. 38 (1979) (hereinafter, UNICTRAL Report) reprinted in 10 UNICTRAL Yearbook 100 (1979).

85. Supra n. 40 p. 34.

86. Ibid p. 324. Also see references cited in supra n.63.


88. See, U.N.Doc. E/Conf.26/SR.17 and 23; U.N.Doc. E/Conf. 26/L.37/Rev.1; Gaja, osupra n.25 1 C.4; Quigley, supra n. 25 at p. 1070; UNICTRAL Reprot, supra n. 84 pr. 41; Paulsson, the Role of Swedish


94. D.R.Thomas, supra n. 65 at p. 37.


96. For example, See Animalfeeds International Corp. v. S.A.A. Becker et Cie, 2 YCA 244 (1977).

97. For example, See La Naviera Grancebaco S.A. v. Italgrani, 4 Y.C.A. 277 (1979); Gotaverken V. GNMTC, supra n. 91.
98. For example, under the English Law leave for enforcement is not necessary in order to confer binding force upon an award. While the Italian Law considers an award binding only when the court has granted an enforcement order of the Pretore i.e. a leave for enforcement of the award. See, **Carlere (Merchants) Ltd. v. Francesco Ferrero**, 4 Y.C.A. 275 (1979).

99. Under the German Law an award becomes verbindlich (the German equivalent of `binding`) only after the three conditions of sec. 1039 of the German Code of Civil Procedure, viz. signing, delivery and deposit with the competent court are fulfilled. See, O.Glossner, National Report Germany, 4 YCA 60(75) (1979).

100. Under the Indian Law an award is not enforceable until it is made a rule of court and a judgment and a consequential decree passed in terms of the award, **vide** section 17, Arbitration Act, 1940.

101. For example, see, **Cartes (Merchants) Ltd. v. Francesco Ferraro**, supra n.98 decided by the Court of Appeal of Naples, (Italy); Animalseeds International Corporation v. S.A.A.Becker at cie, supran. 96 decided by the Tribunal de grenote instance, Strasbourg, (France); Bobbie Brooks Inc. v. Lanificio Walter Berci S.A.S., 4 Y.C.A. 289 (1979), decided by the Corte di Appelo of Florence (Italy) and affirmed, by the Italian Supreme Court in Lanificio Waller Berci S.A.A. v. Bobbie Brooks Inc. **supra** n.68; Fertilizer Corporation of India v. IIM Management Inc. **supra** n. 91 decided by the Southern District Court of Ohio, Western Division (United States).


103. **Ibid** at p. 687.

104. Van den Berg, **supra** n.40 pp. 338-341.

105. **Supra** n. 102 at 685. However, it may forcefully be argued that the rulings referred to in the judgment do not necessarily support the view.

106. For an overview of the differing opinions see, G.Gaja, **supra** n. 25 at n. 74. Also see, Van den Berg, **supra** n.40 p. 341; A Focustoucos, National Report : Greece, 5 U.C.A.S. 57 (1980); O.Glossner, **supra** n.99.

107. **Animalseeds International Corp. v. S.A.A.Becker et cie**, **supra** n. 96; **Press Office S.A. v. Centro**


109. P. Sanders, supra n. 66 at pp. 275-276.


111. Id.


113. The ground has scarcely been invoked and was hardly successful. In fact, out of the 255 reported court decisions, it could succeed only in Claude Clair v. Louis Beradi. [7 Y.C.A. 319 (1982)] decided by the Court of Appeal of Paris (France). See 10 Y.C.A. 399 (1985).


115. Article IX (1) (c).

116. Article 34 (2).

117. Van den Berg, supra n.40 p. 22.

118. UNCITRAL Report, supra n. 84 pr. 43.

119. P. Sanders, supra n. 66 at p. 276.

120. Van den Berg, supra n.40 at p. 22.

121. Ibid at pp. 356-357.

395

123. For cases, see supra n. 114. Also see, Van den Berg, supra n.40 pp. 19-22, 350; P. Sanders, supra n. 86 pp. 275-76; 10 Y.C.A 399 (1985).


126. P. Sanders, Consolidated Commentary Vol. V & VI, supra n. 95 at p. 213.

127. Supra n. 107.

128. For example, disputes relating to anti-trust, patents and trade marks are not arbitrable in the USA.


131. J. Steward McClendon, supra n. 84 at 67.

132. Robert B. von Mehren, supra, n. 90 at 361, P. Sanders, supra n. 86 at p. 270.

133. Van den Berg, supra n.40 368. Also see his 'commentary' in 10 Y.C.A. 404 (1985); P. Sanders supra n. 95 at 323; Stockholm Chamber of Commerce, Arbitration in Sweden (Stockholm, 1984) p. 168.


137. For cases from different countries see Van den Berg, supra n.40 p. 362 et seq; Lew, supra n.52 p. 557 et seq.


140. Supra n. 138 at 979 (ILM).

141. However, Justice Douglas, in his dissent, perceived such emphasis on international character as “ominous”. Ibid pp. 982-988.

142. Supra n. 138 at 980.


144. 391 F.2d 821 (1968).

145. Supra n. 143 at 1072. However, Justice Stevens, in his dissent, feels that the decision rests on vague concerns for the international implications and misguided application of Scherk. He also feels that by virtue of article V (2) (a) and (b) of the New York Convention an award concerned with a non-arbitrable subject matter under domestic law need not be honoured nor awards rendered under them enforced. Asserting that Soler’s claim implicates the U.S. fundamental anti-trust policy and reacting to the courts’ repeated incantation of the high ideals of international arbitration, he feels that, it is improper to subordinate the public interest in enforcement of anti-trust policy to the private interest in resolving commercial disputes, Ibid pp. 1078-1091.

146. Ibid pp. 1071-1077.


148. 5 Y.C.A. 257 (1980).


152. Van den Berg, supra n.40 at 375.

153. Ibid.


155. Article 177 (1).

156. Lew, supra n.52 p. 532.


163. Fritz Von Schwind, supra n. 157 pp. 440-441.

164. The 1927 Geneva Convention, among others, provided for recognition and enforcement of a foreign award if it was "not contrary to the public policy or to the principles of the law of the country" (Article 1 (e)). The 1955 ECOSOC Draft Convention provided for refusal of recognition and enforcement of an award if it was "clearly incompatible with public policy or with fundamental principles". [UN Doc.No.E/AC.42/SR.12/17 (1955)]. The New York Conference rejecting the Brazilian proposal to reintroduce "fundamental principles of Law" (U.N.Doc.E/Conf.26/SR.17) finally adopted the phrase "contrary to the public policy" (Article V (2) (b)) (emphasis supplied).


166. G.Haight, supra n. 159 p. 71; Van den Berg, supra n. 40 p. 361; F.Sanders, supra no. 95 at 323.


168. Id. at 974. (emphasis supplied).

169. Id. at 974.


172. DST v. Raknoc, supra n. 80 at 779.

173. See successive issues of Y.C.A.. For leading cases see Van den Berg, supra n. 40 p. 361 et seq.; P. Sanders, supra n. 95; Commentary in 10 Y.C.A. 401 (1985) and supra n. 66 p. 270. For review of American cases see Aksen, Application of the New York Convention by United States Courts, 4 Y.C.A. 341 (1979); Troboff & Goldstein, supra n. 159.


Fertilizers Ltd. V. Mohindersing, AIR 1985 Bom. 381.


180. C.O.I.S.D.Inc. v. Steel Authority of India, supra n.178.


182. See 7 (1) (b) (ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, implementing the 1958 New York Convention, incorporates the public policy defence mentioned in article V (2) (b) of the New York Convention. For details see infra.

183. Supra n. 178 2 (emphasis supplied).


185. It is interesting to note that art. 1502 of the Nouveau Code de Procedure Civille of May 1, 1981 (France), inter alia, provides for refusal of recognition or enforcement of an arbitral award if its recognition or enforcement is contrary to international public policy (ordre public international), 20 J.L.M. 917 (1981). Also see Lando, Renegotiation and Revision of International Contracts 23 German Yearbook of International Law 37 (1980); Lew, supra n.52 p. 553; Lalive, Transnational (or Truly international) Public


190. Ibid of 234.


192. Id. pr. 50.


194. Article 36.

196. Article 19.

197. Article 34.


Some national legal systems have modernised their laws to promote and develop international commercial arbitration. They are for more innovative than the UNCITRAL Model Law, for example, see, the Florida International Arbitration Act, 1986, 26 I.L.M. 949 (1987); the Swiss Statute on International Arbitration, 1987, 27 I.L.M. 37 (1988); the Belgium Statute on the Setting Aside of Arbitral Awards, 1985, 25 I.L.M. 725 (1986).

For a comparative analysis of recent statutes see, the UNCITRAL Model Law and Recent Statutes on International Commercial Arbitration in Europe and North America, 2 ICSID Review no.2 (1987).